IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§ CASE NO. 23-90020-11
	§ JOINTLY ADMINISTERED
	§ HOUSTON, TEXAS
SERTA SIMMONS BEDDING, LLC,	§ THURSDAY,
ET AL,	§ MAY 25, 2023
DEBTORS.	§ 2:19 P.M. TO 7:18 P.M.

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SERTA SIMMONS BEDDING, LLC,	§ CASE NO. 23-9001-ADV
ET AL,	§ JOINTLY ADMINISTERED
	§ HOUSTON, TEXAS
VERSUS	§ THURSDAY,
	§ MAY 25, 2023
AG CENTRE STREET PARTNERSHIP,	§
ET AL	§ 2:19 P.M. TO 7:18 P.M.

CONFIRMATION CLOSING ARGUMENTS

BEFORE THE HONORABLE DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(Recorded via CourtSpeak.)

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(Please also see Electronic Appearances.)

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HOUSTON, TEXAS; THURSDAY, MAY 25, 2023; 2:19 P.M.

THE COURT: All right. Then officially, good afternoon everyone. This is Judge Jones. The time is 2:19 Central. Today is May 25, 2023. This is the Docket for Houston, Texas.

We have on the 2:00 o'clock Docket, and I apologize for the delay. We have closing arguments in the main case, which only is under Case No. 23-90020, Serta Simmons Bedding LLC, as well as the adversary 23-9001, Serta Simmons Bedding LLC, et al, versus AG Center Street Partnership, et al.

Mr. Schrock?

MR. SCHROCK: Good afternoon, Your Honor, Ray Schrock, Weil Gotshal Manges, on behalf of Serta Simmons Bedding, and its affiliated Debtors. I'm joined in the courtroom today by my partners and colleagues, David Lender, Luna Barrington, Alexander Welch, Gabriel Morgan and Stephanie Morrison.

We also have the Debtor's general counsel, Krista McDuffie, here in the courtroom with us. In advance --

THE COURT: What do you need?

MR. SCHROCK: Oh, we have a demonstrative, Your Honor. We'd just like to --

THE COURT: So then --

MR. SCHROCK: So consistent with the Court's order from last week, we did host a settlement conference at our

offices among the management team, the PTL lenders and advisors, non-PTL lenders, the LCM lenders and their advisors, counsel of the Creditors Committee.

I would say everybody participated in good faith. Unfortunately the parties will not -- they were not able to reach resolution. So we are here and moving forward today, Your Honor.

THE COURT: Got it.

MR. SCHROCK: Your Honor, in terms of a roadmap, here's how we'd like to proceed, subject to however Your Honor would like to direct us. You know, our view has always been that the adversary proceedings have been extrinsically intertwined.

That's why we conducted, among other things, a joint trial. My partner, Mr. Lender, is going to begin by pressing the arguments specific to the adversary proceeding. I'm next, who's going to handle the confirmation related topics.

And Mr. Welch, who's going to handle some of the technical objections including the confirmation order. We can do that at the end if you prefer, Your Honor, and get the arguments out before Mr. Welch's portion.

And then we would cede the podium to the PTL Lenders, of course, being in favor of confirmation that deal with the objectors and any reply.

THE COURT: Okay. Makes sense to me.

MR. SCHROCK: Okay. Thanks, Your Honor, and without further ado, I'll cede the podium to my partner, David Lender.

THE COURT: All right. Mr. Lender, good afternoon.

MR. LENDER: Good afternoon. David Lender, Weil Gotshal, for the Debtors.

CLOSING ARGUMENT

BY MR. LENDER: The company's witnesses came to Court, and provided a clear and good faith explanation of why the company entered into the transaction with the Gibson Dunn Centerview Group in June of 2020.

The company was facing an existential threat due to COVID, and was about to run out of money. It was also significantly over-leveraged, so it did what any reasonable company would do.

It engaged its current lenders, as well as multiple third-party lenders, as part of a competitive process to try to find the best deal that it could in the market. And after significant negotiations, went with the best deal presented.

There's no real dispute as Your Honor recognized, when Mr. Tepner was testifying that the 2020 transaction saved the company at that time. There's also no dispute that without it, the company would likely have had to file for bankruptcy back in 2020.

Engaging the market and picking the best deal available after a competitive process to save the company is

the epitome of good faith, and certainly not a breach of the implied covenant of good faith and fair dealing.

In response, the Defendants have offered a scattershot approach of what LCM's counsel referred to in opening as "theories," that were short on substance and in so doing, ignore what the implied covenant claim is all about.

The implied covenant is not some freestanding, catchall claim that covers anything in business that you don't agree with. A party who asserts the existence of an implied, in fact covenant bears a heavy burden and must prove not nearly that it would have been more sensible to include such a covenant, but rather that the particular, unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole.

A party does not violate the implied covenant by acting in its own self-interest, consistent with its rights under a contract even when such conduct is allegedly unreasonable.

A party has not acted in bad faith where it has valid business reasons on the merits for its actions. The implied covenant also cannot be used to rewrite the party's agreement, or give rights to the contracting party that it could have sought but did not get at the negotiating table.

As a New York Bankruptcy Court held in *In Re: Solutia* (phonetic), based on an implied covenant claim that

the Debtors exploited the barren language of the indenture to enter into a new loan that deliberately desecuritized the notes, quote, "Nothing in the doctrine of good faith and fair dealing allows a court to create contract terms that the parties have not negotiated for."

And in so holding, the court relied on numerous court decisions, that it explored the absence of protected provisions in the indentures, and have declined to read into indenture provisions and protections that are not here.

Here, everyone agrees that the credit agreements negotiated by sophisticated parties were loose, meaning they favored the company. In fact, as you can see from this internal Angelo Gordon deck from March of 2020, this is the reason why they thought they could propose an IP code transaction that would have favored certain lenders over others.

Now when Angelo Gordon and Gamut started purchasing SSB debt at a discount in 2019 and 2020, and Apollo sought to do the same in March of 2020, they did so pursuant to the terms of those loose credit agreements which did not contain anti-subordination as a sacred right, and can now not be read into the contracts through the implied covenant.

They also allowed amendments on majority consent. LCM was subject to those same credit agreements. Defendants also acquired their debt pursuant to provisions that expressly

allowed for open market purchases on a non-pro rata basis, and which carved out open market purchases from the pro rata treatment provision that LCM's attorney argued in his opening was so important to his client.

This renders LCM's attorney rote questions to every witness completely irrelevant because the company had no obligation to offer the deal to LCM. It's also noteworthy that no one from LCM actually showed up to testify.

So there is zero evidentiary support for what his lawyer argued about LCM's supposed expectations. The same is true for Angelo Gordon. They didn't come to testify either. And although Apollo and Gamut did have witnesses appear, their testimony fully supported our view on what was contemplated under the credit agreements.

Indeed, our side called the only witnesses who had personal knowledge about the reasonable expectations of the parties at the time the agreements were made. The PTL Lenders, who unlike the Defendants bought their debt back in 2016, uniformly testified that anyone involved should have known that deals like the 2020 transaction were reasonably expected by the credit agreements.

It's also important to remember why Angelo Gordon and their group were buying up debt in 2019 and 2020. It wasn't because they were benevolent and they were trying to help the company.

As Angelo Gordon's Ryan Mollett revealed in this internal document back in April, 2020, they would love to own the business if it files, given its value. Apollo's internal documents said the exact same thing.

And when their strategy failed because the company decided to go with a better transaction, the Angelo Gordon Group did everything in their power to disrupt it. They first called around to try to prevent the Centerview Group from getting to the 50.1 percent threshold necessary to do that transaction.

Here is Angelo Gordon's 30(B)(6) testimony, which we submitted to Your Honor, admitting that Angelo Gordon did precisely that.

"Question: Was Angelo Gordon contacting these other lenders to try to prevent them from joining the Centerview Group?

"Answer: I don't know the specific conversations that took place. All I know is that they took place."

Then they tried to block the transaction in New York, but that failed. And then they got to a Debtor and agreed never to vote for a Plan of Reorganization unless they all agreed.

You heard about this when Apollo's Theo Kwon testified, and Angelo Gordon's 30(B)(6) witness admitted the same thing.

"Question: And so just so we're clear, on September 28, 2020, AG, Apollo and Gamut entered into a cooperation agreement and agreed not to vote to accept any Plan of Reorganization that has not been agreed to or consented to by the requisite holders, correct?

"Correct.

"So whether or not the Plan of Reorganization was better for the company or its stakeholders, Angelo Gordon, Apollo and Gamut were not going to vote in favor of it, correct?

"Answer: Correct."

So it's somewhat surprising that the Angelo Gordon Group Defendants could come into Court claiming we're the ones who didn't act in good faith given this testimony.

Now during my opening, I stated that the evidence would show three things which prove that the company acted in good faith and did not breach the implied covenant of good faith in connection with the 2020 transaction.

Let me now walk through some of the evidence you saw during this trial which shows that all three points were met. First, SSB entered into the 2020 transaction because it was in financial trouble and was trying to stave off bankruptcy, not to harm the Defendants.

Evercore's Roopesh Shah and independent Finance Committee member, Harvey Tepner, testified and explained the serious risks facing the company after the COVID pandemic hit

the United States, all but shutting down its business.

Here are the minutes of the March 31, 2020, Finance Committee meeting, and here is the situation overview that the board and its advisors discussed in the meeting.

"Following a strong start to the year, COVID-19 has had a material impact on SSB's and its customers performance.

"Current cashflow forecasts indicate the company may run out of liquidity as soon as early July, necessitating an evaluation of transaction alternatives to raise near term liquidity."

And Mr. Tepner explained the company's motivation was to give it viability moving, going forward, not to harm specific lenders that weren't participating.

Let's now turn to the second point which is that SSB engaged in a good faith, competitive process to find the best deal it could get.

The evidence showed that starting in April of 2020, the company was looking at several alternatives to find near term liquidity given its concerns that it would run out of money.

As you'll recall from this slide, that presented to the Finance Committee, the company looked at all kinds of options, including sale lease backs, selling its interest in its China JV, and raising financing from third-party lenders.

It also believed that its existing lenders could be

the most likely source of liquidity for a comprehensive transaction. As a result, throughout April and May, Evercore, on behalf of the company, solicited proposals from existing holders of SSB debt and potential third-party lenders, and negotiated with those parties trying to get the best deal it could for the company.

Evercore's Roopesh Shah explained this to the Finance Committee in April of 2020. Mr. Shah noted the object of the engagement process was to obtain multiple proposals for any transaction and enable a competitive process to obtain the best terms available for the company.

And Mr. Shah explained in his testimony why a competitive process helps get the best deal for the company. It allows us to get multiple bids and keep horses separate, if you will, so we can play terms off each other to get the best deals for the company.

Here is an internal Evercore email identifying some of the parties Evercore reached out in connection with a potential transaction for the party. This included several of SSB's existing lenders, including Oak Tree, Gamut, TSSB and Angelo Gordon, but it also included third-party investors like HBS, Fortress, Center Bridge, Blue Torch, Pemco and Silver Point.

Now at the time, Evercore was discussing an IP code financing transaction with these potential lenders.

Defendants tried to argue that this was our idea, but the evidence showed was actually their idea first, not ours.

As you'll recall, Angelo Gordon proposed an IP code transaction to the company back in March 2020, with a new money component and a debt-for-debt exchange component. It was only after receiving Angelo Gordon's proposal that the company solicited other existing and third-party lenders to see if they can get a transaction on better terms than the one being proposed by Angelo Gordon.

Defendants also argued that we never intended to engage with the Angelo Gordon Group, or we were just stringing them along to try to get a better deal from the Centerview Group.

It's not entirely clear why this even matters given that open market purchases can happen on a non-pro rata basis with whoever we want. But the contemporaneous documents and testimony demolish this theory as well.

In the same April 9, 2020 email we just looked at, as you can see, what Evercore wrote on the week of 4/13, or 4/20, was: "If perceived outreach from Gibson Dunn where they get wind of financing process, do not engage, or engage in diligence with advisors while financing process is ongoing."

So the actual evidence presented at trial is the opposite of what the Defendants argued. Evercore and the company were not stringing the Angelo Gordon Group along, but

trying to get a deal, a better deal from the Gibson Dunn Group.

Mr. Banks was directing his team not to engage with the Gibson Dunn Group, and Mr. Shah explained why. He explained because at that time, they were focusing on consummating the IP code transaction, and were concerned that if the Gibson Dunn Group got wind of that transaction, they might try to disrupt it.

Now at this point in time, in early April, 2020, the lenders represented by Gibson Dunn and Centerview had not even made a proposal. However, as you heard, when Invesco's Philip Yarrow testified, when he and some of the other lenders learned of the IP code transaction that SSB was discussing with potential lenders, they got involved and made a counterproposal that they believed would be better for the company and not based on what its lawyer said in its April 24, 2020 letter to Mr. Schrock, not based on a predatory pricing structure or onerous terms.

Now Your Honor will recall that Gibson Dunn's April 24th proposal only included a new money component which did not address the company's separate goal of reducing its debt burden.

Invesco was concerned that the company was not going to entertain their proposal without a debt reduction component, so they had to respond with something else to avoid

the IP code.

As Kevin Egan (phonetic) wrote to Mr. Yarrow on May 23, 2020, "I agree that we have to put a competitive proposal on the table. We can ill afford to have that magnitude of assets, in particular the IP, dropped from our borrower."

The Gibson Dunn Centerview Group would not make a new offer involving both immediate liquidity and debt capture until May 26, 2020. So the idea that we were stringing the Angelo Gordon Group along in March and April and throughout most of May makes no sense.

There was no competing proposal until the end of May. In fact, that's why Mr. Shah wrote to his colleague, Mr. Banks, at Evercore on May 5, 2020, and said, "We should focus on Angelo Gordon as they continue to be our best course," because as Mr. Shah explained, they had sent their proposal into the company. We were negotiating that proposal. They were furthest ahead, and had the most developed proposal.

Okay. Moving forward in time, here are the minutes of the May 22, 2020, meeting of the Independent Finance Committee that you saw during this trial.

Mr. Shah and Mr. Tepner both discussed these meeting minutes. Slide 3 from the board deck summarizes the different outreach done by Evercore, and the pages that follow summarize the different terms Evercore was negotiating with various

lenders.

As you will recall, among others, Evercore was negotiating with Angelo Gordon, Barings, Fortress and TPG Sixth Street, Blue Torch, Oak Tree and Charles Bank.

And this slide shows that Evercore was negotiating with existing lenders holding nearly 1.4 billion of the 1-L debt, or nearly more than 70 percent of that debt. Looking at the Angelo Gordon Group proposal, you can see how similar it was to the 2020 transaction.

It had both the $200 million new money component, and an exchange component for 100 million of existing 1-L term loan would be at an exchange rate of 85 percent. They also proposed exchanging an additional 493 million of existing 1-L debt, and 41 million of existing 2-L debt at an exchange ratio of 85 percent, and 40 percent, respectively.

The structure was different in that it involved the IP code financing structure discussed during the trial, but there can really be no doubt particularly after Mr. Kwon's testimony last Thursday, that their proposal had the exact same effect as the 2020 transaction.

They were both positioned enhancing transactions. Mr. Kwon admitted that their proposal would have subordinated certain lender who would have lost priority in favor of the Angelo Gordon Group.

Your Honor asked Mr. Kwon, "So the participating

lenders would have had senior debt as to the non-participating lenders, correct?"

And after some colloquy, he admitted "yeah."

"The existing first lien lenders in a drop down transaction would lose priority with respect to claims against transferred collateral, correct?

"That's correct."

He admitted that both proposals would involve only a limited set of lenders. Their proposal also would have involved using proceeds to purchase the Angelo Gordon Group's debt at a discount, and canceling that debt through Section 9.05(G), the open market purchase provision.

You also heard Mr. Kwon testify that their proposal was made in good faith. Angelo Gordon said the exact same thing in a response to a request for admission. So given all of this, how can they credibly claim that the 2020 transaction was not done in good faith, but that their proposal, which would have had the exact same effect, was in good faith.

Angelo Gordon also knows that its claim that the company somehow breached the implied covenant in the manner by which it used $28 million of additional debt capacity to acquire 1-L, or 2-L debt at a discount after the transaction was announced has no merit.

Here is a deck presented by Angelo Gordon to the company back in March of 2020, when they first disclosed the

details of their proposed IP code transaction. And look what they proposed in the last bullet:

"Company uses excess debt proceeds to opportunistically purchase 1-L, 2-L term loans in the open market or subsequent transactions."

They included the exact same thing about using additional basket capacity in their revised May 4, 2020, proposal.

So they were proposing that after SSB did the debt for debt exchange with their group, the Centerview company -- the company could go into the open market and opportunistically purchase additional debt, precisely what the company did after it announced the 2020 transaction as Mr. Shah explained.

In fact, the evidence showed that the company didn't just randomly decide who could participate and who could not. After announcing the 2020 transaction, several lenders reached out to try to get into the deal.

As you can see from this slide, 218 million of 1-L, and 105 million of 2-L debt reached out. Notably, LCM never reached out. They just went immediately to litigation. The company only had limited remaining capacity so it couldn't let everyone into the deal who asked.

But as you saw from this slide, it was clear business rationales for every single lender the company added,

which was all approved by the Independent Finance Committee. This evidence likely explains why, after spilling much ink on this issue in its pleading and briefing, Defendant's counsel abandoned this part of their case during their opening.

Here's why Mr. Seiler said, "There's going to be a lot of evidence about who got to be in, and who got to be out of it. I'm not talking about subsequent purchases. Those are fine."

Let's now turn to the third point, which is that the Independent Finance Committee evaluated the various proposals and selected the best deal the company could get. As the negotiations proceeded, it eventually came down to the PJT Angelo Gordon Group, and the Centerview Group.

Harvey Tepner, a member of the Finance Committee, explained when he testified that after reviewing both proposals, the Committee decided to go with the Centerview proposal because it was a better deal for the company.

This slide summarizes some of the benefits that you heard about during this trial, including that the Centerview proposal resulted in less debt and interest expense for SSB, and did not strip away any existing collateral.

Angelo Gordon recognized the exact same thing, at least outside of the courtroom. This slide comes from an update to Angelo Gordon's Investment Committee back in February of 2021.

As its 30(B)(6) witness admitted during his deposition, Angelo Gordon is recognizing on this page that the transaction resulted in immediate benefits to Serta Simmons. The 2020 transaction actually worked, and the market responded favorably.

Here is the demonstrative tracking the price of SSB debt that Mr. Shah went over when he testified. After initially dropping in price, SSB debt rebounded and exceeded the pre-transaction price.

In fact, the 1-L debt traded as high as 79, nearly double the pre-transaction price before it began to fall more than a year later, due to negative market trends and because Defendants could not refinance their debt.

Thus the 2020 transaction clearly benefitted SSB. Without it, the company likely would have had to file for bankruptcy back in 2020. And the market responded favorably. As a result, Defendants received significant interest payments for several years.

And Defendants could have sold out their position as the debt price soared, but they chose not to. That was their decision, not ours. Unfortunately, due to the market, the company could not refinance its debt, and was forced to file for bankruptcy.

But this doesn't render the 2020 transaction to be one taken in bad faith. Now in the face of this overwhelming

evidence, Defendants have offered a number of theories in this case.

But the actual evidence belied and disproved those theories. Let me now briefly walk through them, some of which we've already discussed.

Defendants argued that the company solicited an IP code transaction. But as we showed you earlier, it was actually the Angelo Gordon Group that proposed that form of transaction first, not us. Defendants argue that the credit agreements never contemplated subordination.

But the very IP code proposal Defendants made which they argued was allowed and contemplated by the credit agreements resulted in the same subordination. They were both position enhancing transactions that the market has seen over and over again.

Defendants argued that the 2020 transaction was never done before, and therefore not on the contemplation of the parties to the credit agreements which somehow means we violated the implied covenant.

This argument actually makes no sense when you think about it for a minute because the Court has already found on summary judgment that the 2020 transaction was a permitted open market purchase, so by definition, it was contemplated by the 2016 credit agreements.

But you'll also recall the testimony from Michael

Searles from Barings. He explained that no transaction is identical, and by definition, every transaction has never been done before it's done.

My alma mater, Duke, had never won a national championship till 1991. Now we have five. The J-Crew IP code transaction that the Defendants championed, that hadn't been done before until creative lawyers, looking at the terms of the credit agreement determined that it could be done in December of 2016, which by the way, is two months after the credit agreements were signed.

And the fact is that several witnesses testified that the transactions like the 2020 transaction had been done before. Evercore's Roopesh Shah testified as follows:

"Question: And you're not aware of any such transaction that anyone in the market had worked on with all of those elements together?

"Answer: I'm not sure if that's the case. I thought there has been some precedent transactions where those elements were present."

C-Sam's witness, Davis Myron, said the same thing:

"Question: Now the Defendants in this case have argued that the 2020 transaction that Serta did engage in was, quote, 'unprecedented and contrary to the expectations of the markets and the parties.' What's your reaction to that?

"Answer: I mean, I find that a bit surprising and

contrary to the expectation of the parties because from an economic perspective, their proposal had a lot of similarities. You know, from market broadly, look, I mean you don't see these types of transactions every day, and you know, maybe there are some nuances to this one, but similar types of, you know, transactions that have similar economic features have certainly occurred, so I don't think it should have been unexpected."

And who could forget the testimony on this point elicited by Defendants counsel, from Barings' Michael Searles, on cross-examination. Mr. Serles explained that he had been involved in transactions, pre-Serta, which involved the priming facility and a debt exchange at a discount.

And when asked to name specifics, he rattled off a number of transactions, Murray Energy, Sandlewood and even one involving Apollo. So theory number three also fails.

Theory number four was that Advent would never do a deal with Apollo. And Mr. Seiler argued in opening, "You're going to hear evidence that Advent, who owns Serta, didn't really want to do a deal that involved Apollo because they were competitors and they didn't want to have a credit where Apollo had an interest."

But that theory completely fell apart as his cross-examination of Mr. Shah abruptly ended with this line of questioning when it failed to pan out"

"Question: Did Mr. Prince ever express a view to you about whether or not he was willing to do a transaction with a group that included Apollo?

"Answer: I believe he was supportive of doing the transaction with Apollo while we were negotiating it.

Mr. Seiler, so:

"Question: So even though they were on the DQ List, he was supportive of doing a transaction with a group that included Apollo?

"Answer: Yes.

"Question: Had he told you that?

"Answer: That's why we were negotiating with his knowledge and understanding, and there was no other alternative until the very last few days, so yes."

Defendants then tried to resurrect this argument one more time during cross-examination of the PTL Lenders. You'll recall they showed C-Sam's, Davis Myron, this Bloomberg message dated June 5, 2020, where it says, "Advent earmarked Barings, Oak Tree and TPG to fill the gap."

They suggested this somehow showed that we didn't want to do a deal with their group, but they ignored a critical fact. When Mr. Shah and Mr. Prince told Angelo Gordon's Ryan Mollett that their IP code transaction wasn't being selected, they asked him if Angelo Gordon wanted to participate in the transaction, and he declined.

So the company went back to the lenders who had made their own IP code proposals to see if they were interested. That's who's listed here. And they got the 50.1 percent threshold they needed to do the deal within a matter of days which Mr. Shah explained he was confident they would be able to get to when the Centerview proposal was selected. So this theory also failed.

Next, the Defendants claim Advent decided who got to participate, again implying an anti-Apollo bias. What Mr. Tepner made clear when he testified that it was the Independent Finance Committee that made the ultimate decision concerning every lender that was added to the deal. So this theory also failed.

Next, LCM's lawyer argued that LCM reasonably expected to be treated pro rata with their fellow lenders, but LCM never appeared to back up his lawyer's claim. We also showed you the credit agreements that said the exact opposite with regard to open market purchases under 9.05(G), which is a clear exception to pro rata treatment.

And further, LCM's counsel conceded at opening that LCM should be treated the same as the other Defendants. So his efforts to distinguish LCM also fails.

Next, Defendants claim that the amendments explicitly permitted with majority consent somehow violated the implied covenant.

But this claim really makes no sense. Defendants conceded in their pleadings that the Excluded Lenders do not dispute that the new money aspect of what they refer to as the unlawful exchange transaction was permitted since new money loans could be given priority without the unanimous vote.

But the new money component required the same amendments as the exchange, as Centerview's Mr. Chopra explained. So how can the amendments be both allowed and not allowed?

The fact is, is that amendments are done by majority vote all the time, as Mr. Kwon admitted when he testified. And here there is no disputes that the amendments that were done here were all permitted with majority consent which the company had. So this theory also fails.

And finally is the issue of the indemnity. We spent a lot of time talking about the indemnity in this case, but for purposes of the implied covenant claim, it is 100 percent irrelevant.

An implied covenant claim must be based on the contract at issue, the 2016 credit agreement, not a subsequent agreement in 2020, to which the Defendants weren't even a party.

So as a last ditch effort, Mr. Seiler said, "Well, the indemnity shows that we knew there was a problem." Really? You heard in this case that practically every deal

has an indemnity, and that they are routine in these kinds of transactions.

And in fact, the Envision transaction involved Angelo Gordon had an indemnity, and it also had the carve out, from the carve out that the Defendants claim was so insidious. And Mr. Tepner explained why the company agreed to an indemnity in the 2020 transaction, and every PTL Lender who testified explained they wanted one for essentially the same reason.

One of the reasons was that it was fraught with litigation risks, and we needed a proper economic inducement for the PTL Lenders to participate and go through with providing new money and providing the discount that the company needed. So Defendants indemnity theory failed as well.

In sum, Your Honor, we believe the evidence is clear that Defendants' multiple theories have no merit, and that the company and the PTL Lenders acted in good faith.

We ask that you enter a judgment in favor of SSB and the PTL Lenders, holding that the 2020 transaction did not breach the implied covenant of good faith and fair dealing.

Thank you.

THE COURT: Thank you, Mr. Lender.

Mr. Schrock?

MR. SCHROCK: Thanks, Your Honor. For the Record,

Ray Schrock, on behalf of the Debtors.

CLOSING ARGUMENTS

BY MR. SCHROCK: Your Honor, you asked at the conclusion of the evidence, that we had a few questions including related to the plan, the propriety of the indemnity claim, whether or not there was business judgment or economic coercion, the absolute priority rule, you had a couple of questions as well as the death trap. I'm pleased to report on the death trap, we did eliminate it from the plan so that's no longer an issue.

We did, of course, file a supplemental brief that addressed these questions. But I wanted to hit a few high points for you. On the plan -- oops. The standards are set forth here which the Court is very much well aware of. I won't go through them in detail for Your Honor.

But we did want to note that the plan incorporates settlements across a number of different classes, that are fair, negotiated at arm's-length. They're in the best interest of the Debtors, their estates and stakeholders.

The evidence overwhelming supports the plan settlements. You know, the evidence is in favor of this plan settlements.

Quote, "It was the best deal for the company at the time. It allowed us to consummate the transaction contemplated by the RSA to get 200 million of cash, 400

million plus of dollars of debt reduction, have liquidity in the company and avoid the pitfall of ruining out of cash and working capital in the summer of 2020."

The consenting creditor settlement including the indemnity is embodied in the RSA in the plan, meets the controlling standard because the Debtors were unlikely to successfully organize without the RSA and they believed they had a high probability of success in the merits of litigation with the 2020 transaction.

The testimony in support of that is set forth on this slide. And that go-forward indemnity was a critical component of the 9019 settlement reached with the PTL Lenders, and not a result of collusion or economic coercion.

I can say as a restructuring professional, I don't know anyone who would have done a deal to equitize their debt without having an indemnity for a transaction that they were being sued on, and continue to be sued on all the way through this case.

We think it's self-evident, but also the testimony backs this up. It is unrefuted, and we think the Record is clear. The settlement clearly facilitated the Debtors exit Chapter 11 process.

We said it before. It is critical that this company get out of Chapter 11 soon. Every day that we're in here is more risk to the business. There are 3,000 employees plus

that are depending on this company to get out.

We believe we have met our burden. But this settlement, including the indemnity are a crux of the Debtors plan with what's required to get the company out of Chapter 11.

The consenting equity holder settlement, we thought that the evidence here again was overwhelming that as a result of these settlements, the equity holders are facilitating and cooperating the implementation of the plan including with respect to restructuring transactions, and through the merger of Dawn Holdings and to Dawn Intermediate, they're transferring certain miscellaneous assets to Dawn Intermediate. All unquestionably provide value to the Debtors and the estates. They're also facilitating the Debtors use of valuable tax benefits. The Creditors Committee, global settlement likewise is supported, and I don't think seriously challenged by the parties.

The evidence in support of that is set forth on our slide. And we think that on the Debtors' business judgment, again overwhelming, unrefuted, as Mr. Lender did for Your Honor, our decisions in 2020, are backed up by a sound record.

Mr. Shah's testimony, Mr. Tepner's testimony, all back this up that we selected a modified detailed group proposal which provided for significant new money because it offered a dramatically different amount of discount captured.

It was important to the company to help deleverage the balance sheet.

There's no evidence in the Record that the Finance Committee and the Debtors' management were subject to any undue influence from the sponsors, Advent or the PTL Lenders. The negotiations were all at arm's-length, and there's nothing to suggest otherwise.

Likewise, in 2022, the company initiated the refinancing efforts. Mr. Tepner's testimony again here, quote, "Severe headwinds in all aspects of this business including overall market deterioration that affected all mattress producers. The company reevaluated a refinancing of its debt, and engaged Evercore to seek potential investors."

They contacted 20 parties to see if there's additional $1.6 billion capital raise. No parties were interested.

And after months of rigorous arm's-length negotiations with the key stakeholders, we reached out to the existing lenders for a restructuring transaction which included attempts to reach a consensual resolution of the non-PTL group.

We continued to assess our options after proposing the plan including weighing and analyze an alternative proposal from Citadel. And even after the Debtors solicited votes on the plan, the Finance Committee evaluated and

concluded that the alternative proposal from Citadel was not in the best interest of the company.

So I highlight some of the reasons for that on the slide pulled up.

On feasibility, again, we don't think that this is a close call. There's no evidence in the Record to support a different conclusion.

The standards as Your Honor is aware is a preponderance of the evidence. There's not a guarantee of success. And the mere prospect of financial uncertainty cannot defeat confirmation on a feasibility objection.

Here, the projections are credible. They were not seriously questioned. They're all based on a balancing of the testimony that even if the projections were aggressive, the Court can find the plan feasible. Here we don't even think that that's an issue.

Mr. Linker testified that in preparing the financial objections, that he and the management team took upon an exercise to build on a new business plan to turnaround the financial performance of the company.

So it was a set of strategic initiatives that would grow our sales, grow our market share, improve our cost structure, improve our profitability. We worked on that for a couple of months, pressure tested those assumptions and then ultimately those initiatives and that business plan is what

formed the input for the financial projections.

He testified further, without knowing the amount of timing, it's not possible for me to include the indemnity obligation in the financial projections. And so the indemnity, there's some uncertainty about the amount we're going to have to work through with the IRS on finalizing the amount, and presumably there'd be some sort of audit process in order to refund to that size.

So there's also upside in the projections that Mr. Linker is speaking to here that also was not included. The Debtors have ample liquidity to service their future debt payments and the Debtors' reorganization plan is not likely to be followed by a liquidation or another reorganization.

Mr. Linker's testimony is set forth here. Nothing has changed since the financial projections were first developed that would cause the financial projections to be modified or altered.

And Your Honor, much was made around a contingent indemnity claim rendering the plan infeasible. I find that to be really a bit of a strange argument because if the plan's confirmed, that means we've actually won the litigation. The Court has made a decision on what the merits of the litigation are.

But the plan is feasible, regardless of whether the Debtors are obligated to identify the PTL Lenders. That

Mr. Tepner testified to this. There was no testimony or evidence that would be contrary to this.

And that indemnity claim would only kick in if the non-PTL Lenders obtain a final non-appealable judgment in their favor, and the likelihood of that, the testimony here from Mr. Tepner details why that's not at issue, just to call into question feasibility.

On the absolute priority rule, the intermediate equity interests are receiving value in exchange for consideration. They're not receiving a distribution on account of the interest.

Rather, the 1.5 million is for what the consenting equity law is providing to the Debtors. We've got the testimony of Mr. Tepner set forth on this slide that details that it was a pretty good trade.

We believe that there's unrefuted evidence that it's an exercise of the Debtors business judgment. They're facilitating, you know, a number of transactions for the use of those tax benefits.

We also don't think that, you know, the non-PTL Lenders nor the LCM Lenders really have standing on this point, to raise the absolute party rule objection because the recovery is in Classes 5, 6-A, and 6-B are provided as part of a voluntary carve out from the collateral, securing the class four FLSO claims, and not account of any value that the

holders are classified claims that otherwise be entitled to recover.

Your Honor, just very briefly on the exculpations, we know that these issues have become forefront for the U.S. Trustee, and with all respect, I will say that I think the evidence here, we made additional findings in the record that we're relying on Section 1107, that was recognized and applied by the Highland Capital Court to the directors.

This is a Debtor-in-Possession. And if, you know, an independent director that is performing the duties of a Debtor-in-Possession under this record can't get an exculpation.

I struggle to find where you could get one. But they are entitled to all rights and powers of a Trustee. I think they're entitled to an exculpation. We don't think the Fifth Circuit's findings in *Highland Capital* were, you know, limited to the unique factual circumstance of that case, but were a natural extension of the case law, entitled bankruptcy Trustee's acting within the scope of their duties, to limited immunity, relying on Pacific Lumber.

And approving the exculpation for each of the directors under the Highland Capital plan, the Fifth Circuit expressly adopted the Fifth Circuit precedent by providing qualified immunity for Trustees.

Your Honor, we're hopeful that the Record we

provided on this point is sufficient. We are not providing exculpations to anyone other than the two independent directors, and we think that the law is certainly in our favor.

The testimony that's in support of that and the additional findings is outlined on Slide 111. And we will be filing a copy of our presentation with the Court so parties interested to have that following today's proceedings.

In all stages of these cases, the independent directors of the Finance Committee believe that they owed fiduciary duties to the Debtors and the Debtors estates, and they were guided by those duties to seek to maximize the value of those estates.

Mr. Tepner's testimony is unrefuted. There was no cross examination on these points. We believe that there shouldn't be any question.

Your Honor, unless you have any questions, I'll cede the podium to Mr. Welch, to go ahead and go through some of the more technical issues with the order.

THE COURT: No, thank you very much.

MR. SCHROCK: Sure.

THE COURT: Mr. Welch?

MR. WELCH: Thank you, Your Honor. For the Record, Alexander Welch, Weil Gotshal Manges for the Debtors.

CLOSING ARGUMENTS

BY MR. WELCH: Your Honor, at the outset, Mr. Schrock offered to dispose of this to the end. So I'm in your hands a little bit. I don't want to take us on a detour if you'd prefer to stay on course.

THE COURT: No, it's all just fine. I frankly would like to know, especially just given the uncertainty exhibited by the Connecticut filing, I'd just like to know what's outstanding.

MR. WELCH: Sure. So Your Honor, when we were before you last week, there were a number of objections outstanding, and we undertook to work with those parties to see what we could resolve in advance of today.

We're happy to report that through the inclusion of, I think we called for some customary language on a number of these issues. We were able to resolve most of these standard language with respect to Maricopa County Treasurer, resolving their objection at 617, Comptroller objection at 821, and also taxing authorities, Texas Taxing Authorities objection at 823, and the Louisiana Department of Revenue at 830.

Those objections have been resolved by the inclusion of language in our amended confirmation order, which is filed on the Docket at 982. There's a redline.

With respect to the minority licensees, we were able to resolve their limited objection, or their objection with some language, again in the confirmation order that just

preserves parties rights with respect to setoff.

With respect to the Humphries, they filed an objection at 829. We were able to, over the course of the week, work on language that we could include in the confirmation order that would resolve their objection. Happy to say it has.

In summary, Your Honor, it simply has the parties provide the Trustee, or soon to be Trustee of the trust some time to reconcile -- get across those claims, work in good faith to reconcile, and if they can't, we'll I think be back before Your Honor to lift the stay, let those be estimated or liquidated.

With respect to Mr. Thierry, Docket 826 at 891, we were unfortunately not able to resolve Mr. Thierry's objection. We don't think that Mr. Thierry's objection actually raises to the level of a confirmation objection.

Rather, he continues to make the arguments that he did in prior pleadings. He does have a Proof of Claim which he has filed. We're happy to offer him the same as which we offered the Humphries, but we don't have a resolution with him, Your Honor.

THE COURT: All right. Thank you.

MR. WELCH: With respect to the Connecticut Department of Economic Community Development, we did think we did have a resolution which when we filed the Agenda. I do

think, Your Honor, that maybe with some words from yourself, it may be resolved.

I think the objection, although I don't want to put words in Mr. Goldman's mouth, I believe his objection relates to concerns over potential amendments to the allocation table that is attached to the plan.

He had wanted an opportunity to be heard if in the future that allocation table is amended. We had offered language that we would not be able to amend that, and indeed, it could only be amended by agreement between ourselves and the Trustee, and of course, still has to be within reason and equitable and all of those things.

But what we had offered was it could not be amended, or such amendment could not go into effect without first giving 10 days' notice of that amendment, and that that would give parties an opportunity to be heard and object.

THE COURT: Mr. Goldman, can I get you to hit five star on your telephone, please, sir?

All right. Mr. Goldman, good afternoon.

(No audible response.)

THE COURT: Ah, Mr. Goldman, I got you unmuted. Do you have me muted from your side maybe?

MR. GOLDMAN: You're very prescient on that, Your Honor. Yes, I did.

THE COURT: All right. Thank you. You heard -- I'm

sorry, go ahead.

MR. GOLDMAN: Yeah. It doesn't quite get us there, Your Honor. You know, we did indeed have discussions several days ago, and I did think that we had this -- our objections resolved.

You know, one of them was what we viewed as lack of specificity as to the criteria they're going to use to reallocate, because the public cable exhibit says among other things, they'll consider the claims reconciliation process without saying what the other things would be.

So try to kind of elegantly addressed that, my idea was that, okay, give us other appearing creditors advance notice of any reallocation and an opportunity for us to object.

Now that's not what their proposed language in the revised confirmation order says. It says that if it would change the existing language on reallocation, and then at the end, it says quote provided that such reallocation will be effective upon 10 days notice of the reallocation being filed with the court.

So two problems with that. Number one, it doesn't provide that the 10-day notice period is a period to afford creditors with the right to object, doesn't say that. But more importantly, number two, it doesn't effectively preserve the rights to object because they are now taking the position

that even if an objection is filed within that 10-day notice period, it won't prevent the reallocation from becoming effective.

I specifically asked them. In other words, the period has to be extended to allow the Court to resolve any objection before the reallocation becomes effective. Otherwise, the notice period is allusory.

THE COURT: So let me ask you this, Mr. Goldman. Would it resolve your concerns if the reallocation were simply done upon further court order after notice and opportunity for hearing?

MR. GOLDMAN: It certainly would, Your Honor.

THE COURT: I'm happy to undertake that responsibility if it resolves the issue.

MR. WELCH: It does for us, Your Honor.

THE COURT: All right. So Mr. Goldman, that's acceptable to the Debtors. You were persuasive on that issue. Someone from the Weil team will send you some corrected or some additional language to implement that proposal for your approval.

MR. GOLDMAN: Right. The concept is agreeable. In other words, it's not going to become effective if there's an objection unless Your Honor rules it to be effective.

THE COURT: Actually what I was -- actually, I was trying to make your life easier. I was just saying that there

won't be a reallocation except upon further order. So Debtors --

MR. GOLDMAN: Okay, even better.

THE COURT: Reorganized Debtors got to file something. You can choose to object or not, and it's -- if you don't object, my guess is the order will probably be relatively easy to obtain. And if you do object, then you'll have a hearing.

MR. GOLDMAN: Yeah, absolutely, Your Honor. It's even better. Your Honor, we're not looking to object to a reallocation. This is just a safeguard, and that's all.

THE COURT: It is because of your imminent reasonableness that I was willing to undertake the duty.

MR. GOLDMAN: Thank you very much, Your Honor.

THE COURT: All right.

MR. GOLDMAN: And I don't need to hold you up any longer then.

THE COURT: And I assume someone from the Weil team will send some language to Mr. Goldman?

MR. WELCH: We will, Your Honor. I just looked over my shoulder to the counsel for the Committee. They will -- I think it will ultimately be filed by the Trustee, but I think they're okay with the approach as well.

THE COURT: That's perfectly fine.

MR. GOLDMAN: Okay.

THE COURT: All right.

MR. GOLDMAN: Great. Thank you, Your Honor.

THE COURT: Thank you. Have a good day. Absolutely.

MR. GOLDMAN: Thank you.

THE COURT: Thank you for appearing.

MR. GOLDMAN: Yeah, thank you, Your Honor.

THE COURT: Is that it?

MR. WELCH: So that is it. It does leave Mr. Thierry.

THE COURT: All right. And Mr. Thierry, can you hear me? Ah, there you go. How about now?

MR. THIERRY: Hi, good afternoon, Judge.

THE COURT: Good afternoon.

MR. THIERRY: Yeah. Your Honor, Cameron Thierry here, pro se, on behalf of myself --

THE COURT: Yes, sir.

MR. THIERRY: -- as a party-in-interest with a standing to bring a claim objection under Title 11 of the U.S. Code, Section 502.

THE COURT: I don't think you mean to bring a claim objection. You want to assert a claim, right?

MR. THIERRY: Yes. Thank you for that correction, Your Honor.

THE COURT: Okay. No one's challenging your ability

to be here and participate this afternoon. Have you understood what the Debtors' position is with respect to your objection?

MR. THIERRY: Yeah, they believe that it had to take issue that have been brought up in my motion for a reconsideration and also my appeal. The notice of appeal and then off of the appellant's designation of the Record filed in the main case.

THE COURT: Okay. Is there anything else that you want to tell me this afternoon?

MR. THIERRY: Yes. You know, if I may begin with a few opening remarks, Your Honor?

THE COURT: Both opening and closing remarks, just whatever you want to tell me, I want to hear.

CLOSING ARGUMENTS

BY MR. THIERRY: Okay. Your Honor, I'm fighting to survive just like the Debtors expressed they are in their opening statement except I'm a human being and they are a self-proclaimed business entity.

Clearly with an ability to impact human beings, and in regards to me specifically have impacted me negatively.

THE COURT: Okay.

MR. THIERRY: I'm currently under attack in my current chosen career field, a circumstance I have unwillingly fallen into which varies vastly from my fellow creditors,

objectors who are based on information and belief. Still gainfully employed despite this Chapter 11 Plan of Reorganization of the Debtors.

THE COURT: Right.

MR. THIERRY: I have lost my job and my livelihood for which cause under Title 11, USC Section 352(D) exists for relief from the automatic stay. As evidence will show as the Debtors are adequately insured through their employment liability insurance policy providing protections against the bankruptcy estate and other creditors alike.

And I do not intend to seek monetary damages beyond any Debtors insurance proceeds threshold with the exception of any applicable or retained limit. The Debtors have valued my claim as zero as a part of the pro rata share allocation for Class 6-B creditors in the current proposed plan for confirmation.

And with my objection of a claim value, Exhibit G, worth $1.6 million as an assessed value to my claim which contradicts their zero value assessment.

THE COURT: Okay.

MR. THIERRY: As evidence also shows, including evidence newly discovered pursuant to Federal Rules of Civil Procedure, Rule 59(E), I remain unfavorably positioned as a candidate for hire in the corporate finance and accounting employment sector, my chosen career field.

Having yet to receive any indication on allegations concerning my now two most recent employment departures. On May 5, 2023, the United States Equal Employment Opportunity Commission issued me a second notice of right to sue, my second most recent employer related to my departure from them which I started employment with them right after Serta Simmons Bedding, LLC.

So again a position, I am, you know, stuck here, left in, you know, before and after the Debtors, you know, get out of their Chapter 11 Plan of Reorganization. And again this position is unshared with my fellow Class 6-B creditors of Debtors who again are still gainfully employed based on information and belief, regardless of their claims against Debtors.

And so unless the Court takes some action regarding my motion for reconsideration, moving the appeal forward or granting me the relief from the automatic stay or any relief from the injunction from the plan, again I'm not protected.

THE COURT: All right. So Mr. Thierry, and I didn't want to prematurely stop you. Is that all that you wanted to tell me because I have a couple of questions I wanted to ask you, if I could?

MR. THIERRY: Your Honor, if I may entertain your questions before proceeding and closing out.

THE COURT: Oh, no, I want you to go ahead and

finish, and I thought you were done. That's why I was asking.

MR. THIERRY: Yeah, I guess, you know, Your Honor, I appear today [indiscernible] be able to survive and thrive if the Court with a vindication getting -- received on my discrimination lawsuit for which relief from the automatic stay or any relief from the injunction post the claimant's confirmation would provide me support.

The Debtors seem to believe they have the power to dictate lifestyles for certain individuals, thereby having kicked me out of their company due to my protected classes. And further down to the ground because they don't see me as the same human being that they are.

That's the bottom line and the impact their decision has with my life and career being the one in jeopardy. I may be (indiscernible) that the Debtors put off my name. I have a claim, the right to be sued for the damages they have caused me, and an impairment to my career resulting from their own misconduct.

I was hired, I do not condone improper firing of others for reasons not excluding what I'm experiencing as this is happening to me right now. But how it must be balanced one way or another by the Court, under the law, with the law upheld and violators held accountable.

So Judge, I had -- are you going to hold Enterprise life over human life, by denying me relief from the automatic

stay to proceed in my prepetition and claims discrimination complaints for damages in front of the appropriate and applicable law.

THE COURT: All right. Mr. Thierry, does that complete your arguments?

MR. THIERRY: Yes, Your Honor.

THE COURT: Okay. So let me ask. Just listening to what you said and trying to work through all of that because you said an awful lot, and I read what you filed. Is it -- are you asking me to treat you differently than any other unsecured creditor?

MR. THIERRY: I'm showing a lack of adequate protection, which puts me in a different position than similar Class 6-B, other general unsecured --

THE COURT: Okay.

MR. THIERRY: -- creditor claims.

THE COURT: So -- and I'm not trying to get you to believe this, but I want you to assume that your belief is just simply incorrect. Generally all unsecured creditors lack adequate protection. Otherwise, they wouldn't be unsecured creditors. And so are you asking me -- and it's hopefully a really simple question. Are you asking me to treat you differently than other 6-B creditors?

MR. THIERRY: Yes.

THE COURT: Okay. And is there any provision in the

Bankruptcy Code that you believe allows me to do that?

MR. THIERRY: Yeah, Federal -- Title 11 of the U.S. Code, Section 352(B), also the Federal Rules of Civil Procedure, Rule 59(E) provides remedies for relief, which I'm seeking from the Court.

THE COURT: All right. So I will tell you that neither that rule nor that Code section allows me to treat one unsecured creditor different from another. So is there any other Code section that you believe allows me to treat one unsecured creditor different than another unsecured creditor under a plan?

MR. THIERRY: I don't have that at my fingertips --

THE COURT: Okay.

MR. THIERRY: -- right now, Your Honor.

THE COURT: So let me ask you the next question. So I think I understood you to say that you filed a claim for -- and I forget the number you told me, but like a million and a half dollars? Am I remembering close to right?

MR. THIERRY: Yes, Your Honor, 1.6 million.

THE COURT: 1.6 million. I wasn't trying to short change you.

All right. So you filed a claim for 1.6, and for purposes of allocation, the Debtors valued your claim at zero. And did you understand that there's a process by which we will figure out what the right number is?

MR. THIERRY: Yes, Your Honor.

THE COURT: Okay.

MR. THIERRY: I understand that process, for the motion.

THE COURT: Not suggesting that that's the right way to go about that, but you do understand that there's a process by which the number will be determined?

MR. THIERRY: Yes.

THE COURT: Okay. So if you understand that there's a process, and with the understanding that you're going to have one way or another, you're going to participate in that process, or let me put it this way, have the opportunity to participate in that process, what is the objection for purposes of confirmation?

MR. THIERRY: You know, that the plan again, if confirmed, you know, I still go in there at an improper value, and this also brings further delay to be able to get the vindication that I need to be able to get a job in my career field again.

So I'm going to be unemployed until I can move this matter forward. And so every day that goes by, I'm not able to put food on my table. So that's what presents, you know, a dire need if you will in moving this matter forward, and not, you know, waiting for other instances of estimates, and continued negotiation on settlement or lack thereof with the

Debtors.

THE COURT: Okay. All right. I do have your motion that is at 679, which is your motion for rehearing. Did you want to have a hearing on that, or do you want me to simply rule on the papers?

MR. THIERRY: I would prefer if you could rule on the papers.

THE COURT: Okay. I will do that. Is there anything else you would like to tell me?

MR. THIERRY: Just that I do understand that there's a process to estimate the claim. I do -- even if it is estimated, Debtors are currently, you know, estimating that the recovery for Class 6-B will only be 8-1/2 percent.

But if you do the math on the 1-1/2 million, you know, that's well short of 200 grand which is, you know, quite a blow to the value that I'm entitled to under my statutory rights, Title 7 and Title 42 of the U.S. Code.

THE COURT: Okay.

MR. THIERRY: And again my employment is imminently threatened with now a second issue, similar incidence of discrimination from the (indiscernible) office.

THE COURT: Right. And how does that factor in to the confirmation process? I'm just a bit confused.

MR. THIERRY: Again it's just -- this process, if I'm second (indiscernible) within the plan again, I don't get

to move my lawsuit forward, and again I don't get to earn income again.

THE COURT: Okay. All right. Mr. Thierry, thank you for your participation. You're obviously free to stay on and watch, but your -- I've heard your arguments. I've noted your objection. I got the motion for rehearing. You're free to go if you wish.

MR. THIERRY: All right. Thank you so much. I appreciate it.

THE COURT: Thank you, sir.

MR. THIERRY: Thanks, Your Honor.

THE COURT: All right. Mr. Welch?

CLOSING ARGUMENTS

BY MR. WELCH: Thank you, Your Honor. A couple last things before I cede the podium. As Mr. Schrock mentioned, we did make some amendments to the plan. We filed a redline at Docket 978, just a few changes in there. I just wanted to draw them to your attention. As Mr. Schrock mentioned, we have removed the death trap. That's in 34 of 78, of Docket 978.

THE COURT: Got it. Give me two seconds. Let me get it up. Just so I get there with you.

MR. WELCH: Sure.

THE COURT: All right. And page 30, what?

MR. WELCH: 34 of 78.

THE COURT: Got it. Okay.

MR. WELCH: And at -- I apologize. There was just -- at 30 of 78, we had struck a reference to a commitment letter that's no longer relevant.

THE COURT: I see that. Okay.

MR. WELCH: And then at 57 of 78, we have made some changes to the -- this is the indemnity, or the indemnity provision that we had made amendments for. This just further narrows the indemnity, requires that parties -- the indemnity, with respect to the 2020 transaction will be provided for holders of FLFO claims and FLSO claims as of the effective date.

THE COURT: Got it. Okay.

MR. WELCH: And that is reflected as well in the plan supplement document that was filed in 993, which is the new term loan credit agreement which has that indemnity and that structure and those limitations incorporated in there.

THE COURT: That was the fourth amended?

MR. WELCH: Plan supplement?

THE COURT: Thought so.

MR. WELCH: 993 --

THE COURT: 993, I'm sorry. Oh, it was the fifth. I'm sorry. Got it. Okay.

MR. WELCH: And that is at -- if you're looking for the indemnity and the changes, that is at 156 of 434 of that

document.

THE COURT: All right. Thank you. Let me just get it up.

(Pause in the proceedings.)

THE COURT: I see it, and I assume that it's all consistent? I'm not going to be able to reach that conclusion.

MR. WELCH: It is, Your Honor. I essentially -- what it does is, it has two indemnities in it. It has the 2020 indemnity for those who are parties to the settlement as initial holders, and it has another indemnity for --

THE COURT: Yeah, it's -- I can't process it in 20 seconds, so I'll take the representation that it's consistent with the plan.

MR. WELCH: Thank you.

THE COURT: All right. Thank you.

MR. WELCH: With respect to other items, we did file our brief at 879 with respect to the 1129 factors. Unless Your Honor has any questions, I know there's others waiting in the wings here. We've aligned our papers on those factors.

THE COURT: I've read the brief. Thank you.

MR. WELCH: Thank you.

THE COURT: All right. Thank you.

MR. WELCH: Thank you, Your Honor.

THE COURT: All right. Mr. Costa?

MR. COSTA: Yes, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MR. COSTA: It looks like you're -- already switching it to the other --

THE COURT: I was grabbing the video screens.

MR. COSTA: Gregg Costa, from Gibson Dunn for the priority lenders and counterclaim Defendants. Your Honor, I'm going to do the closing argument on the adversary and then I'll turn it over to my partner, Mr. Greenberg, who will address confirmation issues from our perspective.

THE COURT: All right. Thank you.

CLOSING ARGUMENTS

BY MR. COSTA: At the start of this trial 10 days ago, I said that two pillars of commercial law would resolve this trial. The first is that businesses can rely on the words of contracts.

The second, that businesses have a duty to seek profit and prevent loss. The evidence showed why those two principles require this Court to reject the implied covenant claim.

Evidence that was overwhelming, that was often uncontroverted showed that the priority lenders acted consistently with both of these principles. The transaction they entered into in 2020, was supported by the words of the 2016 credit agreement, and they did so as an act of self-

defense, to protect their investors against the dropdown transaction that had disastrous downside consequences for the investment in Serta debt.

I'm going to spend the next few minutes walking you through the evidence that shows why these two principles, each on their own, require rejection of the implied covenant claim. So I'll start with the contract.

Just last month, the *Cordero* case from New York's highest court, reiterates that an implied covenant claim must arise from the contract. It can't be based on extra-contractual hopes, the attempt to write into a contract terms that the parties neglected to negotiate for.

It's a narrow doctrine under New York law. And when a party does something that's authorized by the plain words of the contract, there is no implied covenant claim. And that goes back to this principle that a business should be able to rely on the words of contracts.

That's why they spend all kinds of time and money negotiating those contracts and having lawyers review their contracts before they enter into a transaction under those contracts.

And so that there's some certainty that when they conduct a transaction like what happened in 2020, that as long as it's consistent with that contract, they can expect it to be implemented and not to be challenged in court.

The implied covenant doesn't override that. It doesn't allow you to rewrite the contract. If it did, there would be a cloud over transactions because even if your lawyers tell you that what you did is authorized under the contract, someone can bring a good faith, that implied covenant claim, base it on the testimony of someone a year out of college who didn't even look at the key terms of the contract, and who says, "Well, it's just not what I expected might happen under the contract."

There's a reason that New York law puts this emphasis on the contract itself, and that's exactly why your ruling on the contract claim alone requires the dismissal of their implied covenant claim.

Now those principles of New York law make the implied covenant claim very narrow in all context. But when you're dealing with sophisticated parties, it's basically the size of the eye of a needle.

There are very, very few cases in New York that have allowed a judgment under the implied covenant when sophisticated parties had a contract that governed the transaction.

And certainly the sophistication of these parties can't be denied. These parties are as sophisticated as it gets with the best counsel money can buy. So again, no basis for reading into the contract limits that they didn't

negotiate for.

The Court ruled back in March, at the summary judgment hearing, that this transaction was an open market purchase under 905(G), which is an exception to the pro rata right under the contract.

And I said back at that summary judgment hearing that the contract's ruling itself could be game over for the entire case, even for the implied covenant claim. Now the Court understandably said, "Well, you can have the implied covenant as a fact bound area of the law" and perhaps there's some other conduct out there that wasn't before the Court at that time, showing that there was some bad acts here, even though what our clients did was authorized under the plain words of the 2016 agreement.

Well, now we've had this trial. And you've seen that there were no other bad acts. This was done consistent with the contract, and allowing their claim to prevail here would be allowing them, seven years after the 2016 agreement, to get out a drafting pencil and rewrite the contract.

They want to use that pencil to erase Section 2.18, which has the language that carves out from pro rata treatment open market purchases under section 905. They want to erase other provisions like 905(G) itself, 902(B)(a)(6), to say there are exceptions to pro rata treatment.

It's not an absolute right. The testimony that they

thought they could be first in line forever is just not consistent with the contract. I think the evidence that's shown at this trial that the implied covenant claim really is nothing more than an attempt to relitigate the contract claim.

It's two sides of the same coin. It's an attempt to rewrite the contract. It's an attempt to undo your ruling a couple months ago that said this was allowed under the contract.

And I think a tell for that, Your Honor, was the expert they wanted to put on. And you rightly struck that expert a few days before trial, saying that that expert is basically just disagreeing with your contract ruling.

And I think really the arguments we heard during the trial and I expect you're going to hear in a few minutes are also just really trying to relitigate the contract claim and undo your contract ruling.

So I think this alone, the fact that the words of the contract between these sophisticated parties allowed the 2020 transaction. That alone is enough to rule and reject the implied covenant claim here. But there's more, there's a lot more, other reasons to reject the claim as well.

Now I'm a little reluctant to even get into this issue of expectations because the best place to look for what parties should expect under a contract is the words of the contract.

Again that's why you hire lawyers to scrutinize those contracts. But since there has been a lot of talk about expectations of the parties, I do want to focus on the evidence that entirely shows that this type of transaction, which you deemed a PET, a Position Enhancing Transaction, that the parties in 2016 would have understood that PETs were possible.

Mr. Chopra from Centerview talked about the climate in 2016. It was a very borrower friendly climate, and these liability management transactions were already happening. And so they were very flexible agreements the parties knew could be used to have people jump the priority line.

Same thing from Mr. Sveen at Eaton Vance at the time, 2016. The agreement was loose and that was expected at the time. That was consistent with the credit market generally.

Mr. Searles, from Barings, the same understanding, flexible, loose documents. Invesco, Mr. Yarrow, gave testimony consistent with all the other witnesses, and these are the witnesses who talked about 2016, right?

They were buying the original debt. This is the evidence about 2016, and to the extent these expectations are relevant, it has to be the expectations people had in 2016. And this is the evidence you heard about expectations and the business climate in 2016.

Now the ultimate question is what would be the reasonable expectations of someone in 2016? But it's the expectations of someone sophisticated in this area, and we presented this testimony of a number of those sophisticated people who told you what the understanding was back seven years ago.

There's no evidence to the contrary. No one came in who was involved in either negotiating the 2016 agreement, or in buying the original debt in 2016 who said otherwise, right? What did we hear instead?

Well, Mr. Kwon who was involved when Apollo later rebought the debt, he understood. He basically agreed with our witnesses that the 2016 credit agreement was very loose. He agreed with that. It was company friendly.

He didn't dispute that the climate generally allowed for these PETs to happen. Mr. Hannigan, nice fellow, but he basically knew nothing in 2016. He was one year out of college.

He was working as an investment banking analyst, not in the credit markets, and he didn't ever focus on 905(G). You remember, even to this day, he doesn't understand what an indemnity is, so I don't think he had anything worth saying about what the expectations would have reasonably been in 2016.

Now at least though, Gamut had someone testify at

trial. Angelo Gordon didn't even have anyone come into this courtroom at trial and say what the expectations might have been in 2016. Again, they didn't even buy any debt until 2020.

But they did have a witness, Mr. Gladstone, testify as their 30(B)(6) witness. In his deposition, he was not the main person at Angelo Gordon on the transaction. For whatever reason, they decided he was the one though who should be their corporate representative.

And what do we know about Angelo Gordon. Well, they proposed a PET in March of 2020, so that reflects their understanding that this was a loose, flexible agreement. We also have this document from Angelo Gordon which you've now seen highlighted a number of times, calling it loose, weak, allowing for a liability management solution.

Apollo, the same thing, March 2020, Mr. Kwon saying the documents are loose and allow aggressive maneuvers. And of course, you know, it's always better to look at what people do, than what they say.

Now here I don't think those were in conflict. I think what people are saying in the courtroom and what they did in the real world are consistent. The people understood this 2016 agreement was flexible and allowed for PETs.

But again, let's look at the most persuasive evidence, which is what people actually did in the business

world. And we know that the triumvirate, Angelo Gordon, Apollo, and Gamut made a dropdown proposal in March 2020, before we had even come up with our proposal, that did basically everything they're complaining about in our transaction.

They relied on the open market purchase provision for a debt exchange. It was privately negotiated. It was going to require new credit agreements. The participation was limited. In fact, it was limited to a minority of lenders, unlike ours that had over majority involvement.

The participants were prioritized in the event of a default. I mean, that's the whole reason they wanted to do this. And the debt was going to be repurchased at a price above the secondary market trading price.

So they understood all of those things. And to use Mr. Hannigan's words, you know, their concern is supposedly that they bargained to be first in line and then they were no longer first in line.

I think that's actually the right way to look at it. You know, an implied covenant claim, it's not about the specifics or the mechanics of the transaction. I mean, that's involved in the breach of contract ruling that you already issued.

The implied covenant claim is about what, if it has any scope at all, it's what is the expectations of the parties

who entered into it? What are they being deprived of? And it's -- they're saying they're being deprived of being first in line.

But the fact that there were these various PETs out there, including the dropdown they proposed, that would have had that impact of making people jump in front of the line, I think that's the relevant expectation.

And across the board, everyone either testified or through their actions showed that the expectation was that people could jump the line under this loose and flexible credit agreement.

What else do we know about the conduct in the real business world? Well, after our deal, the Defendants, Apollo and Angelo Gordon, did very similar deals, Mitel, and Envision.

Mitel involved Apollo. Now it is important here to look at the date because what they're trying to say is, well, yours was in bad faith in 2020, but once you did it, well, that changed the expectations and then it was okay to do it after the first one.

I don't think that makes a lot of sense regardless, because it's basically saying only the first actor's bad, and everyone else can then do copycat transactions and they have some of immunity and it's all kosher.

But the big problem is their dates are wrong. The

Mitel credit agreement was in 2018. So even under their theory, their theory would only work if the underlying credit agreement for Mitel happened after our 2020 transaction, right?

And then their theory is well, you know, now in 2023, people have different expectations. But Mitel, the credit agreement that was being amended occurred in 2018. And so in 2018, no one knew specifically about the Serta transaction so their whole theory breaks down and falls apart.

Now again our point is, in 2016 and 2018, this same time period, the market understood these were loose, flexible agreements so they all are consistent with the expectations of the parties.

But there's no basis for differentiating them as they're trying to do, and the chronology, the timing, like I said, blows their theory apart. Mr. Kwon acknowledged that what happened in Mitel wasn't uptier, the same thing they're complaining about here.

Envision, Apollo again, in 2018, the underlying credit agreement in Envision is from 2018, before our transaction. So our transaction had not happened when those expectations of the parties to the 2018 Envision agreement had been, you know, created.

But again, Apollo thinks it's perfectly fine to do an uptier transaction with Envision, amending the 2018

agreement. And then there's a second Envision transaction. I'm sorry, well, this first shows that Apollo recognized they were acting in good faith.

They acknowledged good faith in both Mitel and Envision. That brings us to the second Envision transaction, which involved Angelo Gordon. This was a dropdown, stripping all the collateral, again under a 2020 agreement.

So our view is this shows what was going on in 2016 and 2018, flexible agreements. And again, Angelo Gordon also recognizing good faith when they did it, but for some reason it's terrible when we did it.

So to wrap up this point about contracts and expectations, they want to expand the implied covenant claim. They want to override the contract, rewrite it. And what that would do would lead to, you know, increased litigation even when people are acting under a contract, and it would deter creative business solutions that can solve serious problems like the one Serta found itself in, in the height of the COVID pandemic, in the middle of 2020.

The law, it would be bad policy to give such an expansive scope to the implied covenant. And fortunately the law doesn't allow that kind of implied covenant claim.

So now we're going to move onto business justification, our second basic principle, which is that businesses not only have the right to pursue their self-

interest and protect against loss, they have a duty, they have a fiduciary duty to do that for their investors.

New York law recognizes this principle, just as it does in business judgment rule context, just as in tortuous interference. Having a business justification is a defense, and the implied covenant, business justification is a complete defense to any implied covenant claim.

As long as you're acting for a legitimate business purpose, you can't be held liable under an implied covenant claim. And what is a legitimate business purpose, it's acting your self-interest.

That's the way the business world works. You're allowed to make money. And if you're acting that way, that defeats an implied covenant claim. The implied covenant claim has to be based on malicious acts, acting purely to hurt someone else rather than to benefit yourself.

And as we've said, this was a matter of self-defense. Even if there was no competing offer and we had made this offer, it's still a valid business justification under New York law because we're allowed to make money and take the best risk for our client.

But this is an easy case because we were doing this -- we weren't the first actor. We were doing this as a matter of self-defense. And I think the critical point in the time line is this May 22 Centerview presentation.

You heard Mr. Chopra talk about it. And it presented some options. Remember, at this time, the only proposal the priority lenders had made was for new money financing. It was going to be available to all the first lien lenders.

But then the Centerview presentation, there's rumors in the marketplace. They know there's a competing offer. And by this time, there's belief it's going to be a dropdown transaction that the other group is pursuing.

And so you have the last two options, 3-A and 3-B, are what Centerview feared what the other side was doing. And you can look at the recovery estimates, and worst case scenario, our clients could have lost, you know, 80, 90 percent of their principal, 13 percent, 11 percent recoveries if this dropdown goes through and there's a default.

I mean those are disastrous consequences. It's basically losing your entire investment. I think Mr. Yarrow, from Invesco, said this threw a curve ball into the whole negotiation. And of course, they wanted to act to prevent this dire scenario from coming to pass.

There's Mr. Yarrow, he says the only reason why we put the deal in front of the company, and he's talking about the exchange part of the deal, the discount part of the deal, was to stop them from doing the Gamut transaction.

Again, Mr. Sveen, Eaton Vance, same thing, backed into a corner, having to realize a 25 cent hit, a haircut from our principal, it was tough to swallow, but they had to put an alternative together.

That's what was driving the open market purchase that the other side's complaining about. And again here's just the brief chronology. I've already talked about. At first, our group is just putting together new money financing, open to all.

It's this late May period, with the Centerview presentation, that causes a change in plans. We know we have to be more competitive. We put together the debt exchange, and we put together a proposal that's better for the company, that's going to allow it to delever more than the other side's proposal.

And Serta saw that, that our proposal was better for the company on all measures, and accepts our proposal. Now this was not the deal of the century. It wasn't viewed at the time as some bonanza for our clients.

It wasn't viewed as some windfall. It was a calculated risk. They were nervous. They didn't want to go down to 74 cents on the dollar. Here's an email from May, this time when it's all happening, saying this is really too low but again we're so worried about this competing proposal, we've got to be competitive.

And then after the fact, you know, now, three years later, this is all viewed in hindsight, as well. We made this great deal and the other side wasn't allowed to do this great deal.

For awhile, no one knew if we made a good deal. They didn't know if it was worth that discount, and you've been this demonstrative now many times. You're familiar with it.

In early '21, our folks were sweating it. They thought they have made a bad deal when it's trading back at 80 cents, and if the company had thrived, and we weren't in Bankruptcy Court today, it would have been a bad deal because we took the haircut.

So it was a calculated risk like all these business decisions. But it certainly wasn't some sweetheart deal we got from the company. And there's the testimony from Sven, saying how this deal was certainly not viewed at the time as a sure fire winner.

So for all those reasons, Your Honor, the business justification is rock solid. It's self-defense. We were reacting to their proposal. We had to protect our investors. And so for the priority lender Plaintiffs, the claim should be dismissed on that ground as well as on the fact that the contract allowed what they did.

There's some forgotten parties in this case. The

counterclaim Defendants who weren't involved in negotiate -- proposing or negotiating this 2020 transaction, they've hardly been mentioned here.

And there's no evidence whatsoever that they did anything wrong, and they weren't involved in the transaction, so I don't see how there could be any evidence that they somehow violated the duty of good faith.

So now I want to move onto the Defendant's arguments. I can't beat Mr. Lender's graphics with the flags. I liked that one. But I first want to talk about jurisdiction which he didn't touch on.

You know, the other side's now saying well, you don't even have jurisdiction to decide this case, right, and they have two arguments. One, it's not core, and two, there's no -- under *Stern versus Marshall*, you can only write a recommendation to the District Court.

Well, on the core issue, you've ruled twice. In staying the New York litigation, you held this was core. And then in granting judgment on the contract claim, you found that it was a core proceeding.

And that's absolutely right. This is all about, to use their language, who's first in line. That's a core Bankruptcy Court function. It's arguably the core Bankruptcy Court function along with administration of the estate. So I'm not going to spend more on the fact that this was core.

And then as to *Stern*, first of all, the Fifth Circuit has taken narrow view of *Stern*. I don't think there's many cases at all recognizing *Stern* beyond the exact claim at issue in that case.

And *Stern* itself says, it doesn't apply when -- for claims that would be resolved in the process of Rule 11 creditors' Proof of Claim. That's part of what we have here. And the Fifth Circuit, in the *Renaissance Hospitality* case, indicated that 157(B)(2)(k) proceedings do not encroach upon Article 3 courts after *Stern*. So I think this is perfectly permissible under *Stern* for you to rule.

And in fact I think the Defendants have also consented to jurisdiction under *Stern* under the *Wellness International* decision because what happened back in the contract claim? They didn't say in summary judgment briefing, oh, Judge, you can't rule on this because there's a *Stern* issue.

And then they agreed to the entry of partial judgment under 54(b), which had language again saying you had jurisdiction. And they didn't say then, well, there's a *Stern* problem.

And then they asked the Fifth Circuit to authorize the appeal that trumps the District Court. And they didn't identify as an issue for the Fifth Circuit any argument that you lacked authority under *Stern*. So for a number of reasons

Stern isn't an issue.

Mr. Lender pressed -- touched on this, and I've already talked about it some, their argument that, you know, ours was unprecedented, and you can never be first. You can only be second, third, and fourth, and then you can do what you want to people.

Again, the testimony is different. The people who testified about 2016 expectations understood that PETs were possible.

I think this is -- I know nothing escapes Your Honor's attention. But this was a piece of evidence, an exhibit, that didn't get a lot of attention at the trial. But I think it's important. It shows that Apollo asked Paul Weiss to do due diligence on the possibility that an uptier transaction exactly like the one we did, whether that was possible under the agreement.

Mr. Kwon admitted that the transaction they asked Paul Weiss to diligence was like the one we ended up successfully implementing. So that's quite telling about whether this was -- is unprecedented as the other side says.

But here's the real problem with their argument is that all the parts of this transaction it's undisputed were out there in the marketplace, had happened: priming debt, debt repurchases, limited participation, amendments by required lenders.

I t's sort of -- their argument is basically like, well, we know there's all those toppings you can put on a pizza, but we don't think you can have that combination of toppings. And that just doesn't make much sense. They knew all of these things could have happened individually. So it's hard to see why that poses any problem.

And, again, testimony throughout the trial from various witnesses saying that all these components had happened and were known about in the credit markets.

And this sort of gets to the core of it. They showed no bad faith generally. They've tried to trumpet this June 4th letter sent to UBS questioning the validity of a dropdown transaction.

But there's nothing wrong, as Mr. Chopra said, with saying -- you know, we don't know the details at the time, we don't know exactly what provisions of the credit agreement they're using. There's nothing wrong with saying you'd better make sure that that's allowed under the credit agreement. It's certainly that letter pales in comparison to the hardball the other side was playing. You'll remember when they learned that the -- we -- our deal prevails, they offer $30 million to us to say, well, withdraw your proposal so we can -- our proposal will win.

I mean, Serta worked hard to have a system that would allow Serta to get the best offer. They entered into

NDAs, right. And they wanted to enter into those NDAs so there was no collusion among the lenders and that they would get the best lender proposal for the company.

Well, paying off $30 million to withdraw your proposal guts that whole process Serta put together. And it would have -- if that had happened -- and there was testimony that calls were actually made. There was testimony about that. But if it had gone through, it would have hurt Serta. They wouldn't have been able to deleverage to the extent they did and survive a few more years after COVID.

Then they say, well, it's bad faith because, you know, you didn't let just everyone join in. Well, I think it's just basic economics. Mr. Chopra explained it. To give the discount we were giving, to give that steep haircut, you had to be getting something in return.

And what were they getting in return? Well they were going to the front of the line. And if everyone was going to the front of the line then there wasn't -- that consideration wasn't going to be worth it.

And, again, look at what their proposal, only a minority of lenders were going to be participating. So how can they complaint about ours as bad faith when we at least had a majority of the lenders who would be benefitting?

Then the indemnity we've heard so much about. Again, it's common in the industry. They went immediately to

court before we closed in New York State Court, tried to get a TRO to prevent the closing. It would have been malpractice not to try and get an indemnity agreement. They say, well, it shows the carveout to the carveout saying, you know, well, even if it's bad faith, it -- you can -- there's still indemnity if it involves a 2020 transaction. Again, there's nothing wrong with that.

They point to public policy concerns with forward-looking indemnities. And New York courts and other courts are skeptical of those because if you say, well, we'll indemnify you even for intentional conduct and fraud for years to come, that creates bad incentives, right?

But here it was a backward-looking indemnity. The company was indemnifying something they knew everything about. The company was involved in the 2020 transaction so they know what we had done, they knew what they did. That backward-looking indemnity is not problematic in any way. And of course Angelo Gordon, showing it's perfectly reasonable, had the same language in their envision agreement.

Then I don't want to leave out LCM. LCM, I have to give them credit at least because as I've said, I think this whole trial was really a repackaged breach of contract claim. LCM at least is upfront about it.

I mean, in their post-trial brief, they're basically saying you need to revisit the contracts ruling, right,

because they have this amend and exit claim where they claim the order in which the amendments and the debt, the new loan agreements happened was somehow violative of the 2016 agreement. So at least give them credit for just being upfront about the fact that they're trying to relitigate breach of contract.

The problem is, that ship's sailed and it's docked up in the Fifth Circuit. You entered a judgment on the contract claim. That's a binding judgment and the Court can't revisit the contract claim.

In any event, there's no basis to do so. Their theory doesn't make sense. In *Murray Energy*, the Ohio Bankruptcy Court said it was sophistry, said the claim had no merit.

And you can look at the agreements we highlighted in our post-trial briefing. We made a condition precedent. The votes and the amendment process were condition precedent to the new loan documents issuing the new loan purchases happening.

So to sum up, Your Honor, you've described these as PETs. We're almost nearing the three-year anniversary of this transaction. It's been litigated almost from the beginning. And finally, after almost three years, there's been a full hearing in this court.

And I think what that trial has shown is that there

was nothing about this case other than good, old-fashioned competition. Two groups put together a proposal. We just won. Our proposal was better for the company. And they're unhappy. They don't like to lose. Some of them don't lose that often. And they're trying to change -- you know, they lost at the negotiating table. They're now trying to undo that in court.

But I think the evidence you've seen shows we both made proposals that had the same economic effect. There was no bad faith in those proposals. It was just good, old-fashioned business competition. And it was good business judgment that our clients exercised. And as a result, there's no merit to their claims. You should grant our declaratory judgment and dismiss their counterclaims.

Unless the Court has any questions, I'll turn it over to Mr. Greenberg. But he can decide if he wants that slide to --

THE COURT: Okay.

MR. COSTA: -- stay up.

THE COURT: Thank you, Mr. Costa.

Mr. Greenberg.

MR. GREENBERG: Good afternoon, Your Honor. For the Record, Scott Greenberg, Gibson Dunn & Crutcher, on behalf of the PTL Lender group.

Your Honor, I don't have slides. And I think that

was an intentional decision after I saw Mr. Costa's closing slide, that there was not going to be a chance I would outdo them.

But in all seriousness, I'm going to focus, I think as Mr. Schrock did, more on the confirmation-related items.

THE COURT: Right.

MR. GREENBERG: Obviously they tie to the adversary. And there are some objections that have been raised.

CLOSING ARGUMENTS

BY MR. GREENBERG: But, Your Honor, obviously we've spent the last five months talking quite a bit about the litigation. And the litigation, this confirmation are certainly entangled. But I don't want to lose sight, and I'm sure the Court hasn't lost sight, of where we are in these Chapter 11 cases.

The cornerstone of these cases when we filed back in January was an RSA and a plan which had 85 percent of the first lien first outs as signatories and 84 percent of the first lien second out.

As Your Honor knows, you approved the Disclosure Statement. The plan has been solicited. And the voting deadline has passed. And as Your Honor knows from the voting tabulation, the plan enjoyed overwhelming support. The plan was accepted by 99.9 percent of the first lien first outs and 95.63 percent of the first lien second outs, a hundred percent

of the unsecured trade claimants.

And as Your Honor knows, the Unsecured Creditors Committee also supports confirmation of the plan. And that Committee is a fiduciary for all unsecured creditors, like the PTL Lenders and the future owners of this business have a vested interest in making sure this business succeeds. The objection deadline has passed. And as Your Honor knows, we just spent last week clogging up what I know is your very busy calendar, putting in evidence in support of confirmation.

Your Honor, I'm not going to spend too much time on the 2020 transaction in detail because you've heard a lot. What I will say is that when we all got back together as professionals in the summer of 2020 and the Debtor's professionals reach out to us, but not only us -- as you've heard, they reached out to the non-PTL Lenders as well -- we knew we had an issue on our hand that related to the Debtor's capital structure that was going to require recapitalization transaction and was in all likelihood, and turned out to be true, going to require an in-court process.

There was a problem, however, that we had, which was the Debtors and the PTL Lender group had significant litigation ongoing with the non-PTL Lender group.

And as Your Honor heard through the first day declarations at the outset of the case, while the parties, both sets of groups, were negotiating with the Debtors in the

fall of 2022, Angelo Gordon, Apollo, and Gamut refiled their litigation in New York State Court in front of Justice Masley, the same litigation that they had voluntarily dismissed a couple years earlier.

That was by my count the fourth lawsuit we faced collectively we -- the PTL Lenders and the Debtors, since we completed the transaction in 2020. So I think it's fair to say that the continued and pervasive litigation overhang was going to put a cloud over these cases that we needed to deal with.

And we knew collectively that absent a final non-appealable order adjudicating the issues, that there was no liability for the Debtors or the lenders thereunder, we were going to have to come up with a different construct. As Your Honor knows, the Debtors proactively filed an adversary proceeding on day one of these cases. And part of that was to try to bring finality to the ever-continuing litigation that had been ongoing for the last three years.

The non-PTL Lender group, as Your Honor also knows, has not been shy that they have no intention of putting down their litigation swords. So it should come as no surprise to anyone, as you've heard through the testimony of Mr. Yarrow and Mr. Sveen and Mr. Searles that our clients were very focused on having the proper protections in place as we moved this process forward.

So I think we were dealing with a practical problem, Your Honor, as we prepared to file these cases, which is how do you streamline the Chapter 11 cases to protect the company while at the same time dealing with the relentless litigation of the non-PTL Lenders? And I do believe in retrospect we came up with a pragmatic approach, to delever the balance sheet of the Debtors and try to quickly emerge from bankruptcy.

Your Honor, I'm not going to pretend that it was all altruistic. Obviously our lender group was also focused, as you heard through the testimony last week, on their own litigation overhang, given the relentless litigation by the non-PTL Lenders.

But speed was the key to this bankruptcy proceeding, as you've heard throughout. You heard that through the testimony of John Linker, the CFO of the Debtors, and Mr. Tepner, who's on the transaction and Finance Committee. From the Debtor's perspective, an expedient exit from bankruptcy was paramount. A quick exit helps the Debtors obviously maintain their business continuity. It reassures employees, it preserves jobs, and fosters stability.

And candidly, Your Honor, I think the parties also wanted to avoid handing any more litigation leverage to the non-PTL Lenders by requiring a non-appealable final order because by definition strategically obviously the other side

will do everything in their power to stretch out these cases and keep this company in bankruptcy to create more leverage against the Debtors and our clients.

Your Honor, effectively we reached a practical solution which is before Your Honor. And I think everyone's been entirely transparent throughout these Chapter 11 cases about it.

We filed an adversary day one with the Debtors. There's a go-forward indemnity which I'll talk about. There are CPs to getting a favorable ruling as it relates to the 2020 transaction to confirmation, which the Debtors and we have briefed.

And the idea was to get the company out on the fastest timeline for the benefit of its employees, its investors, and its customers.

Your Honor, the indemnity, which I'll touch on because I know it's been the subject of a lot of objections and a lot of the back and forth with Citadel last week with the competing financing, exit financing proposal.

But I think our collective view, and this is in the Debtor's confirmation papers as well, was that the indemnity would also be less likely to be called upon because, as we've talked about, the plan has a CP to confirmation as it relates to a ruling on the 2020 transaction. And Your Honor has obviously already ruled on the open-market purchase.

We recognize that there's still appellate risks. We're well aware of the Fifth Circuit appeal that's pending. But we're narrowing the scope, so to speak, of the risk profile go forward I think from both ours and the Debtor's perspective.

Your Honor, the indemnity also makes sense from our perspective. The first lien second out lenders under the plan, Your Honor, our clients for the most part, obviously others as well, will become the owners of the company. And practically speaking these lenders, if and when this hypothetical ever plays out, obviously we don't think it's a high risk, but if it does ever play out, as the owners of the business in the future, they'll have a decision to make if there's a claim, whether or not they put the claim back against the company and impact their equity or they deal with the claim in some other fashion. It's a hypothetical but it's one that we'll deal with down the road if and when it ever comes to fruition.

If -- and, Your Honor, I would say it's not as draconian as I think the papers have attempted to paint the indemnity as we've talked about and the evidence supports. The indemnity obviously is a very common feature in all of our exit facilities as we emerge from bankruptcy.

And we do believe it was a practical solution to deal with the litigation, while at the same time the

alternative would have been to say to the Debtors, well, you have to stay in chapter until we get a final non-appealable order and we have a resolution once and for all. And that would not I think have been to anyone's benefit, and certainly not the Debtors.

And really addressing some of the objections that have been raised, Your Honor. Despite the characterization by the objecting parties, the go-forward indemnity is part of a holistic settlement and compromise that was bargained for under the RSA and embodied in the plan.

The indemnity benefits holders of all claims in Class 3 and Class 4. And it's part of the consideration they're receiving under the plan. Everyone gets the same treatment.

These are allowed claims that were stipulated by the Debtors under the DIP order and never properly challenged by the non-PTL Lenders or any other party-in-interest.

And as Your Honor recognized last week, the indemnity is not severable on its own. It's part of a global settlement. And I know a lot of this was highlighted in the back and forth with the competing Citadel proposal. But it was part and parcel, as you heard through the testimony of Mr. Sveen, Mr. Yarrow, and Mr. Searles, of the bargain they reached with the Debtors to support the plan.

Your Honor, to hit on some of the issues you raised

as well in your commentary to all of us Thursday when we broke, as Your Honor noted, there are limitations under 1123(b)(2) of the Bankruptcy Code. As you note -- as I'm sure the Court noted, the Debtors have amended the plan prior to the confirmation hearing to make it clear that the indemnity is not being assumed in any way.

The other issue I'll touch on, and I know we all collectively briefed it, is the 502(e) objection which was raised both by the non-PTL Lenders and Citadel. And I candidly think that one's a bit of a red herring, Your Honor. The Class 3 and Class 4 holders of the funded debt claims indisputably have allowed claims against the Debtors. And those holders, as you heard through the testimony, are receiving the indemnities in the takeback credit agreement as part of a distribution of their claims.

So 502(e) is irrelevant from our standpoint because those holders, our holders, are not receiving anything on account of our allegedly contingent indemnification claims, Your Honor.

And irrespective of the foregoing, I don't want to go too far down the rabbit hole because I don't think we need to, but even if 502(e) did apply in the claims objections that have been brought, I do think those still fail.

As you know, the non-PTL Lenders and LCM and others have gone out of their way in front of this Court on multiple

occasions, whether it was in the 105 context or otherwise, to make clear that those claim -- that they have claims that are against our clients, the PTL Lenders, only. So there's a little bit of arguing both sides of the coin here.

They've -- they haven't put any evidence in to support conclusory remarks that somehow we are co-liable which, as Your Honor knows, is the first element under 502(e)(1)(B). And that's a conjunctive test under 502(e)(1)(B), and we don't feel like there's any evidence to support it.

And for the same reason, with a lack of evidence on co-liability, we feel 509(c) fails as well.

But I come back to where I started, Your Honor. We indisputably have allowed claims to the tune of billions of dollars against these Debtors, and they're being compromised. And part of that compromise, if you look at it most simply, is we're getting two pieces of currency. One is equity on a pro rata basis, and one is a takeback loan. And embodied in that takeback loan is the indemnity that we bargained for.

Your Honor, one other point I want is just transparency. I think we've been very transparent, as have the Debtors, from the very first day. And Mr. Schrock going back and looking at the transcript, you know, pointed out to the Court the importance of the indemnity given the litigation overhang and the negotiations that were had around that

indemnity.

I don't think anyone has ever done anything but been transparent with the Court throughout pleadings, our filings, the supplemental pleadings filing the credit agreement that spells it out so everyone could see it for the world to let them know it was there. So there's been no attempt to hide the importance of that provision to our clients.

And just to get to the punchline, Your Honor, because you heard it last week through the testimony, there would be no confirmable plan without the indemnity.

Now, you heard the indemnity was part of the holistic deal. At trial you heard testimony from four separate institutions of the PTL Lenders, Andrew Sveen from Eaton Vance, Davis Meierings from Credit Suisse, Mike Searles from Barings, and Phil Yarrow from Invesco, each testified of the importance of the indemnity and, when asked, answered clearly that they would not have voted for the plan if that indemnity was not baked into their consideration.

And, Your Honor, you also heard testimony from our investment banker, Mr. Chopra, who made clear that without even looking beyond those four holders, those four holders alone hold enough paper in the first lien second out that you cannot confirm a plan around them.

So as such we feel like the Debtors would not have, and I think the record supports, a confirmable plan without

that indemnification provision baked in.

And so what does that equate to and where are we? I mean, in my mind, Your Honor, it really boils down to the Debtor's business judgment is what we're talking about. In terms of evaluating whether the plan can be confirmed with this provision, it's a question of whether the Debtors exercised their business judgment.

The condition precedent in the plan, Your Honor, that this Court rule favorably an adversary proceeding, plus providing a new go-forward indemnity to holders of Class 3 and 4 claims, I believe is a pragmatic solution to implement a significant deleveraging of the Debtor's capital structure now and emerging from bankruptcy in a timely fashion.

You heard testimony from Mr. Roopesh Shah, the Debtor's banker, you heard testimony from Mr. Tepner from the board of the Independent Committee, and you heard testimony from Mr. Linker, the CFO, all about the deterioration that would come to this business if it had to mire in bankruptcy for any elongated period of time.

And no other party, as Your Honor knows, can substitute its own judgment for that of the Debtors who are fiduciaries for the estate.

Your Honor, I would argue that the Debtors received real value in exchange for the indemnity. I think when we had this dialogue last week in court, just to paraphrase, Your

Honor, I think the question was, what did the Debtors give and what did they get?

Clearly the Debtors gave in terms of protecting the PTL Lenders from appellate risk until this issue is finally adjudicated.

But what did they get in return in exercising their business judgment? I think the Record would reflect they got a lot, Your Honor. Mr. Shah and Mr. Chopra both testified about the value the Debtors received here, just in its most simple form, the equitization of over $1.6 billion of debt to effectuate this restructuring.

But let's not lose sight on the fact that they also got from our clients an RSA, which we filed when we filed the cases, support for uncontested use of our cash collateral. Our clients were party to and part of the UCC settlement. They -- we voted to accept the plan in overwhelming favor. And, again, we're agreeing to equitize over $1.6 billion of our debt.

And as the Debtors themselves noted in their conclusions of fact and findings of law, given all the litigation that's been brought by the non-PTL Lenders to date, there simply would be no plan, no equitization of claims, no reorganization without an indemnity moving forward relating to this litigation.

Indeed, no rational party would agree to equitize

claims without an indemnity. I think Mr. Schrock articulated that point well at the outset of today's hearings.

So, Your Honor, I think the Record shows pretty clearly that the Debtors received sufficient value in exchange for agreeing to the RSA in the plan with the indemnity provision, but without the requirement, the alternative as I would put it, of a non-appealable final order.

Your Honor, just two other points I want to hit quickly because you raised them in our comments to us at the end of the hearing last Thursday. One was economic coercion. Your Honor, the plan -- I think the testimony and evidence is very clear as you -- we've listened to a week about the competing proposals from the two parties, that this was the result of good faith and arm's-length negotiations. It certainly wasn't the result of economic coercion. And the Debtors were not forced to agree to a deal with our group.

I'd like to think after all these years I could coerce Mr. Schrock and get him to a deal that I wanted for my clients. But I've been at it for 20 years and I'm still batting zero.

But in all seriousness, Your Honor, the Debtors made a series of reasoned decisions, the benefits of the plan and agreeing to a go-forward indemnity to allow this company to emerge swiftly through Chapter 11.

The Debtors were free to negotiate and agree with

whatever parties they wanted. Obviously they were negotiating with the other party. Again as we came upon these Chapter 11 cases in the fall, they simply had a decision to make, and they exercised their business judgment in agreeing to do a deal and sign an RSA with our clients.

The last thing, and I'll hit it very briefly because Mr. Schrock covered it and covered it well, feasibility was raised in some of the objections: 1129(a)(11), as Your Honor knows, simply requires that a Debtor show that confirmation proposed plan is not likely to be filed by a liquidation or need for further reorganization.

It does not require that a Debtor prove its reorganization will be successful no matter what. If that was the case I guess we would have no Chapter 22s.

Your Honor, the Fifth Circuit law, and it's the applicable law, is that the Debtor needs to show a reasonable assurance of commercial viability. And that's the matter of *Re Briscoe Enterprises LTD*, 994 F.2d at 1160.

As Your Honor knows, to date there's been no adverse decision related to the 2020 transaction, no judgment, and certainly no speak of monetary damages in any definable fashion. So I think when we talk about feasibility, we are talking about a true hypothetical that in no way should prevent confirmation of this plan.

Potential appellate risk years down the road, Your

Honor, does not warrant denying conformation of a plan that's supported by 99 percent of the first lien first outs, 96 percent of the first lien second outs, a hundred percent of the unsecured trade claimants in the UCC, and delevers the Debtors balance sheet by approximately $1.6 billion.

And with that, Your Honor, I -- with no fancy slides, I will rest.

THE COURT: Mr. Greenberg, thank you, sir.

MR. GREENBERG: Thank you.

THE COURT: Okay. Oh, I am so sorry. Can we get the Committee since they support? Thank you.

MR. WILSON: Good afternoon, Your Honor. Eric Wilson of Kelley Drye for the Creditors Committee. With me in the room are my colleagues Jason Adams and Sean Wilson. I've been quiet.

CLOSING ARGUMENTS

BY MR. WILSON: I rarely speak unless I have something to add, which is decidedly rare. But I thought I'd start out the way I have in previous appearances before Your Honor, which is to say that the Committee's always understood the benefits of this plan, even before we reached the settlement.

The significant debt reduction, treatment of general unsecured creditors, particularly with respect to go-forward creditors in Class 6, Class 6-A, who were originally scheduled

to receive payment in full, albeit over the course of a year, was certainly a good start.

So against that backdrop the Committee undertook its investigation of the Debtor's path towards Chapter 11, as well as the assumptions behind the plan and the treatment of all general unsecured creditors, including the non-go-forward creditors in Class 6-B who were receiving a very different and less favorable treatment than the Class 6-A folks.

So we did that investigation. We cast a broad net. We covered not only transactions with the lenders that the Court's been hearing so much about, we did a review of their liens. And we also looked at numerous other transactions with third parties.

And with the cooperation of the Debtors and the PTL Lenders, we were able to quickly conduct some thorough and comprehensive discovery. We were able to complete our diligence.

And despite the testimony you heard from Mr. Tepner last week as to his belief as to the lack of merit with respect to those claims, we did identify value for general unsecured creditors, including some unencumbered assets, a number of viable claims related to historic transactions, including dividend payments. There was a prepetition KERP and claims arising from the 2020 transaction.

Fortunately, following numerous discussions with the

parties, we were able to agree to the terms of the settlement that's incorporated into the amended plan that you have before you. That settlement involves a number of key improvements that Mr. Schrock previewed in his opening statement last week. Those include an accelerated time table for full payment of the Class 6-A go-forward creditors. They will now be paid within 60 days of the effective date as opposed to one year.

The settlement also provides for a material increase in the recovery to non-go-forward creditors in Class 6-B. That took us from a million dollars to $5.75 million, plus the proceeds of certain litigation claims.

And, finally, the plan provides trade creditors with a viable go-forward business partner which was at the beginning and remains very important to the Committee.

So with those improvements and others, including exculpation of the Committee members, the Committee supports the plan.

I would point out and echo the representations made by counsel for the PTL Lenders that we did have full Class 6-A support for the plan and a unanimous vote.

And while Class 6-B actually rejected the plan, I think those votes were cast -- or I know they were cast before the settlement was reached. And as we mentioned, that settlement has exponentially increased the recovery to those folks. And we believe that with that settlement the plan is

fair and equitable with respect to Class 6-B.

So with that, unless Your Honor has any questions, we'd ask the Court to approve the settlement and confirm the plan.

THE COURT: Mr. Wilson, thank you. And I appreciate the pragmatic approach exhibited by the Committee in the case.

MR. WILSON: Thank you, Your Honor, appreciate it.

THE COURT: Thank you.

All right. Have the parties objecting -- I -- Mr. Lieberman, are you going first?

MR. LIEBERMAN: I think so.

THE COURT: Okay. Fair enough.

(Pause in the proceedings.)

MR. LIEBERMAN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. LIEBERMAN: Neil Lieberman on behalf of the LCM Defendants.

CLOSING ARGUMENTS

BY MR. LIEBERMAN: At the outset of the trial I told you LCM was focused on specific and narrow claims that Serta and the PTL Lenders breached the 2016 credit agreement by amending the agreement at a time when they no longer held first lien debt; that in the alternative, if the Court found that the 2016 agreement's expressed terms permitted the lenders to simultaneously amend and exit the agreement, it was

a breach of the implied covenant to do so.

And, finally, that it was a breach of the implied covenant to carve up the 2016 credit agreement in secret with the specific goal of stripping LCM's priority rights.

And I said that while LCM's claims were derived from the deal documents themselves, the evidence presented at trial would fully support LCM's theories. And I submit that it has. It's uncontested that the 2020 transaction required Serta and the PTL Lenders to amend the 2016 credit agreement to permit the transaction. And it's uncontested that amending the agreement requires the required lenders threshold of 50.1 percent of the lender's at the time of the amendments.

But as the documents and testimony made clear, the amendments were approved simultaneously with and conditioned upon the PTL Lenders exiting the 2016 agreement. So there was no moment in time which the PTL Lenders both held first lien loans and were subjects to the amendment they agreed to. Indeed, the amendments were contingent on exit because they were designed to redound to the benefit of the amenders and to disadvantage the remaining holders of the first lien loans. The lenders testified as much.

Mr. Sveen testified that there was only one transaction presented, and it was one transaction together, and that he did not believe amendments would be approved without the exchange.

Mr. Yarrow agreed that Invesco never considered voting for the amendments without participating in the exchange, and that the deal formed one transaction. The deal documents confirm this.

The amendment itself, it's styled as a condition subsequent, but it is immediately following the execution of the amendment the credit -- PTL credit agreement becomes effective and the PTL new money term loans are funded and initial PTL exchange transactions consummated. The open market purchase is similar.

And the PTL credit agreement actually has it in reverse. It says that each exchanging lenders "X" sold into an open market purchase and sale transaction its relevant existing loans in exchange for consideration consisting of a new class of loans, and is further described in the open market purchase and cash exchange agreement by providing their consent to amendment number one to the first lien loan agreement.

Serta and the PTL Lenders have argued that the amendments occurred just prior to the exchanges. But it's a tenet of New York law that an agreement has to be read and not to lead to an unreasonable outcome.

And here's it commercially unsustainable and unreasonable to interpret the contract in a fashion that allows a majority of contract participants to vote to amend a

contract so that the amendments never apply to them. Indeed, the majority vote requirement is there to protect the lenders. And I point to Section 9.05(G)(6)(a) where affiliated lenders that continue to hold debt don't count towards the tally of required lenders.

The exceptions to the contract for amendment that require all adversely affected lenders to vote provide additional support. How can it be on one hand that there's a set of transaction that -- transactions that specifically required adversely affected lenders to vote for a transaction and a -- but yet another where the transaction doesn't require any remaining lenders to vote for it?

Just turning to one of the arguments we heard from Mr. Costa, the summary judgment ruling doesn't foreclose this claim, in our view. The adversary amended complaint seeks a declaratory judgment that the transaction was permitted under the non-PTL term loan agreement.

At the hearing, Your Honor said you were only ruling on the open market purchase and 9.05(g), and that's at the transcript 135, 4 to 9, "What I'm not prepared to find in that all aspects the credit agreement was complied with. I don't have the evidence before me. What I was asked to determine, at least the way I read it, was that was whether or not the commercial transaction that was engaged in fit within 9.05(g), and I find that it does."

The order on summary judgment states that the Court finds as a matter of law that the term "open market purchase" is clear and unambiguous and, therefore, has not resorted -- and the Court did not resort to as stringent evidence to interpret that provision.

On that basis the Court grants summary judgment for Plaintiff, declares that the term "open market purchase" in Section 9.05(g) of the non-PTL term loan agreement is clear and unambiguous, and declares that the transaction entered into by Plaintiffs and certain other lenders in June 2020 constituted an open market purchase under Section 9.05(g) of the non-PTL term loan agreement.

The summary judgment order does say that whereas the parties to this adversary proceeding agree that in light of the Court's summary judgment ruling, the Court should enter partial final judgment in Plaintiff's favor on Plaintiff's claim that the transaction was permitted under the non-PTL term loan agreement, the Court finds that there is no just reason for delay in entering partial final judgment and hereby enters partial final judgment in Plaintiff's favor on that claim under FRCP 54(b).

But Weil's notice of proposed order, which is Docket 138, specifically states that it reflects the ruling issued by the Court on the Record, which was limited to the open market purchase.

Accordingly, the LCM Defendants still have a live counterclaim for breach of contract to preserve their appeal rights and in light of the Court's statement at the hearing. That partial grant of summary judgment was sufficiently narrow to, in our review, let us continue to bring that argument.

Even if the Court were to hold that the amendment process was technically permissible under the credit agreement or that we were foreclosed from making the contract claim, it's -- the uncontested facts of the amendment support a claim for breach of the implied covenant.

Manipulation of rights for personal gain to deprive the other party of a benefit of a bargain is a violation of the implied covenant. And we cite cases in our brief on that, *Shatz v. Chertok*, 180 A.D.3d 609. That's from the Appellate Division, First Department, 2020. The *Richbell versus Juniper Partner -- Jupiter Partner* case, 309 A.D.2d 288, also the First Department, 2003. And very recently in a very similar case at the trial court level in the *Boardriders* case, which is 2022 Westlaw 10085886.

Here, the implied covenant claim is clear. The PTL Lenders were paid for their consent to amend the credit agreement on their way out, reaping an undeniable personal benefit and destroying LCM's and other lenders' first priority rights. Testimony has borne this out as well.

As discussed, the PTL Lenders unanimously testified

that the amendments and exchange were part of a single transaction and they would not have voted for the amendments without the benefit of the exchange.

And it is uncontested that the PTL Lenders and only them benefitted from the amendments. And, indeed, it was necessary to exclude the nonparticipating lenders to accrue that benefit. As Mr. Chopra testified, all else being equal, the more first lien lenders left behind, the better.

New York law also requires consent of nonparticipants to cleanse any implied duty violation. Those -- that was the holdings in the *Cass* case and in the *Octagon versus NYDJ Apparel* case.

The PTL Lenders will no doubt argue that the transaction agreements were executed simultaneously, and the amendments came in to affect legally a millisecond before the exchange. But this is meaningless sophistry and would elevate form over substance.

And the case *KeyBank versus Franklin Adviser*, 616 B.R. 14, Bankruptcy Southern District of New York from 2020, basically cautions against that saying that transaction that lack economic substance or elevate form over substance and that merely represent efforts to undermine another party's contractual rights are prime examples of matters that may constitute breaches of the implied covenant. And that's precisely what happened here.

The transaction also violated the implied covenant because it had the effect of stripping LCM of its pro rata rights, which also is a classic implied covenant claim. And we heard testimony from Mr. Tepner that priority was a fundamental feature of the 2016 credit agreement.

We also -- it's undisputed that amendment was necessary to strip this fundamental feature and that Serta and the PTL Lenders ensured that only the bare majority were invited to participate, that non-participated -- nonparticipants were not alerted to the transaction until it was fully baked. These are the uncontested facts.

And New York courts have acknowledged that they are sufficient to support a claim for the violation of the covenant of good faith and fair dealing. We heard that first from Judge Vela. We heard it again in *Boardriders*. And most recently in the *AEA v. Marblegate* case from the First Department, 185 N.Y.S.3d 73.

The justifications that you've heard this afternoon and throughout the trial fail. The arguments that all position-enhancing transactions were commercially encompassed by the 2016 agreement misses the point. LCM isn't challenging generally position-enhancing transactions.

It is challenging this particular transaction on the specific bases that the PTL Lenders violated the implied covenant not to amend the agreement in a manner that would

only detrimentally apply to others, and would be contingent on their exit from the credit.

The inquiry is then on that level of specificity, not generally whether there was some general risk associated with the credit agreement. At that level, one key difference here is that a so-called dropdown transaction and the one at issue here is -- that admittedly the dropdown transaction did not require amendment.

You need only look to the language and intent of the contract in this analysis. And we think the *Empresas* and *LightSquared* cases are instructive on that front, and that creative manipulation of agreements that undercut the parties' intent to constitute violations of the implied covenant are nonetheless are not violations of the implied covenant.

Plaintiff's business justification for their wrongful conduct also proves too much. The implied covenant is a contract claim. We cited *Williston* for this point. There are cases that reiterate at *Parlux v. Carter Enterprises*, 204 A.D.3d 72, and *Smile Train v. Ferris Consulting Group*, 117 A.D.3d 629.

Business justification doesn't absolve one from liability for a breach of contract, and it doesn't resolve one from liability likewise of a breach of implied covenant claim. Serta's brief at paragraph 244 concedes that point.

There was -- and I would add that there was no need

for some of the gratuitous amendments that were made and actually none offered. You heard testimony about the creation of another priming tranche that could have been used that was not necessary to effectuate this particular exchange. And we saw presented to Mr. Tepner an amendment that eliminated the requirement for a going concern opinion from the company's auditors for the remaining first lien lenders.

I'd add that the Second Circuit rejected the business justification defense in the *Travelers* case cited in our brief, 41 F.3d 1570. And, indeed, there's always a business justification offered in support of a transaction subject to a good faith and fair dealing allegation. Using that as a blanket defense would eviscerate the doctrine.

And as we've heard a number of things today which would similarly do so that if it's sophisticated parties with sophisticated counsel, you know, they should be allowed to engage in creative business solutions. And that just simply isn't the law in New York.

And, again, I point to the *Empresas Cablevision case versus JPMorgan*. You know, JPMorgan, pretty sophisticated, but there they argued the same thing, that the conduct was expressly permitted by the contract. They had a business justification to try to sell a participation in a loan when they couldn't syndicate it. And, you know, they engaged in a quote/unquote "creative" business solution, and yet it's still

a breach of the implied covenant.

And similarly *LightSquared*, you know, there you had Carlos Slim engaging in a creative business solution, and again under the argument that the conduct was expressly allowed in the contract.

So I do want to get back to the point about I think reasonable expectations. Reasonable expectations, as we set out in our briefs and I said in my opening argument, is an objective standard. So the argument here that you haven't heard from LCM as a witness about what its reasonable expectations are is it invites an error of law. It's an objective standard.

I think what you heard in general is from the lenders who are parties to the contract in 2016 is they thought the agreement was loose and, therefore, you should have been able to predict all manner of liability management solutions.

I would suggest that one doesn't follow from the other. Just because a document is generally loose doesn't mean that you're now, you know, you have no rights as to any possible transaction.

I'd also note that every transaction they refer to occurred after 2016. So if you're talking about whether it's J. Crew dropdown, Murray Energy, Cineworld I think is after our -- you know, I'm not sure how that came out, that's after

Serta. But all of those happened after the 2016 transaction. So if we're trying to lump these in as like, well, we should have been aware of this or that's not part of our reasonable expectations in 2016, I would suggest in 2016 those were all new. And so if that's the measuring date then it was reasonable for us not to suspect that.

I also think that our -- with respect to our claims, the reasonable expectation still stands. It was a unique transaction, it was a one-of-a-kind transaction.

Finally I'm going to turn to *Stern v. Marshall* which instructs that the Bankruptcy Court cannot sue -- or cannot issue a final judgment on matters of common law like LCM's contract and implied claims. The exceptions to Stern don't apply here. There's no public right at issue.

We've said all along we're willing to consent to treatment of our claims under the restructuring and without waiver of our ability to pursue the PTL Lenders and seek damages. That would alleviate the need to decide on our -- you know, make a ruling with respect to our Proofs of Claim. And we don't think the ongoing indemnity plays into the analysis. In fact, I think the indemnity reflects that we have a claim for damages and not a claim about challenging the priority here today.

I also -- one of the arguments made in the brief and I think earlier today was that we waived our *Stern* argument.

That's not so. We answered and counterclaimed after you ruled on -- from the bench on summary judgment. So there was no waiver with respect to those claims.

Our claim -- counterclaims are unique in that they seek damages and not a declaration. And we never sought summary judgment on our counterclaims, so we think we're protected there.

We think that the *Saenz* case that was cited is not really on point at all for that reason. They -- where they went through all of trial without making the argument.

And, finally, we always objected to the Court's final judgment jurisdiction which Serta acknowledged in footnote seven of its brief.

And our consent to entry on the motion for summary judgment doesn't mean we consent to entry on a different claim, on a counter claim which falls squarely within the -- with *Stern's* ambit.

THE COURT: So it's your belief I've got to issue a report and recommendation only on your claims.

MR. LIEBERMAN: That's my belief.

THE COURT: Okay. I just want to make sure I understood.

MR. LIEBERMAN: In conclusion, LCM has been crusading against this uptier transaction since it was consummated in 2020, and the reasons I think are now clear in

the Record.

LCM is a CLO investment platform that manages over $12.3 billion in assets, it invests in large financing, and even among our adversaries here is not considered to be a threat to other market participants. It wasn't invited to participate in the Apollo transaction. It hasn't been locked up or otherwise affiliated with Apollo group during its quest to right the wrong that was done here.

Indeed, it is uncontested that outside of court-administered restructurings, LCM has not participated in a transaction that would have given it differential treatment unless that opportunity was offered to all members of its class pro rata.

We're now at another inflection point in our fight. Since we began, New York courts are in accord that the conduct like that on the record here constitute violations of the implied covenant. First, we have Judge Vela's order, then *Boardrider* is issued by Justice Masley, who permitted this transaction to go forward in the first case. And now the AEA case by the First Department.

This Court should find the same here and issue a report and recommendation that the 2020 transaction violated the 2016 agreement and the implied covenant to it.

With that, I'll close LCM's argument here but by no means conclude its fight.

THE COURT: Thank you.

MR. LIEBERMAN: Thanks.

THE COURT: All right. Who's next?

Good afternoon. I got it transferred.

MR. SEILER: Excellent. Good afternoon, Your Honor, Eric Seiler for the Excluded Lenders other than LCM.

And before -- well, and I'm going to try not to repeat because I agree with much of what LCM --

THE COURT: I was just --

MR. SEILER: Okay.

THE COURT: -- enjoying the whole irony of the whole thing.

MR. SEILER: All right. Well, it's important to enjoy this a little bit as well as how serious it is.

So and before I start, I just want to thank the Court. I'm sure everyone would have said the same thing, and maybe it does need to be said, but for the time you gave us in the middle of a very busy Docket that you kept inserting around us and still have your full attention and more on top of the exhibits than all the lawyers, and particularly for encouraging the firms to allow other younger lawyers, less experienced lawyers to put on witnesses and to let them do that. And I think we all took advantage of that, and it's very appreciated.

THE COURT: Good, thank you --

MR. SEILER: -- by everyone. So --

THE COURT: -- for saying that.

CLOSING ARGUMENTS

BY MR. SEILER: And then I think I kind of have two challenges. One challenge, which comes from Gibson Dunn, is I need to convince the Court that there is a potential implied covenant of good faith and fair dealing claim that is not precluded by the Court's decision on the contract claim already.

You allowed us to come forward to have the trial, but they're still arguing that basically the decision on the contract claim makes it impossible, I think talked about the hole in the middle of a needle. But his first point was there's no hole, there's no needle, you just can't do it. So I have to convince you to consider it.

And I -- we tried to do that in the brief. I know you've read the brief so we addressed that. I'm going to talk about it a little because I think that is the law in New York, particularly in *Marblegate*, which is the First Department came down within the last year.

But the second hurdle, and we can go to the next -- the first slide -- are all position-enhancing transactions the same? Because when you're -- I was -- the last day after you let that young lawyer, Mr. Ehrlich, do the examinations of some of our witnesses, I was sitting in the back and I'm

listening. And you tell us, well, I think of these as position-enhancing transactions, and acronym PET. And of course it's a wonderful acronym because it got to have pictures in the Gibson Dunn closing, and it's been picked up in the briefs by Weil Gotshal. It's as though it existed forever. And indeed it's been in the New York research. And so the acronym has caught on, so it's a great acronym.

But you said that you kind of think they're all the same. And I'm thinking, well that's a pretty big challenge for me because if they're all the same, and I think ones that were well-known are -- were expected, then I'm not going to overcome the reasonable expectations test and so it's going to be hard to convince you that there's been a violation of the implied covenant of good faith and fair dealing.

So anyway I'm sitting in the back of the courtroom listening to all of this. And I also realize it's all ending earlier than I thought it was going to. And I'm on this very late flight, can I get on an earlier flight. And now I'm placed in competition with all of those younger lawyers who are fast at rebooking their flights. And so I'm trying to then -- by the way, I succeeded. I was the only old lawyer on the 5:00-whatever --

THE COURT: Got it.

MR. SEILER: -- o'clock flight it was.

THE COURT: So just be honest, who actually did it

for you?

MR. SEILER: No, no. I did it myself but Blair gave me advice admittedly. Ms. Albom gave me advice but I've been able to do it.

And so but I'm thinking, okay, and you talked about walking your dog when you were doing all of this when you were talking about how it came to you. So I'm thinking, well, going on a flight, walking a dog. So this is like an emotional support animal on a plane which -- and so this is the PET we expect on the plane, right? And sometimes you don't like it, but you kind of know that someone sitting next to you might have a dog, a big dog, a small dog, a cat. And I'm thinking, well but do they let all the dogs on the plane? Are all the pets the same? Are all the emotional support animals the same?

And Ms. Albom reminded me that United had faced this issue in 2018 when -- we go to the next slide -- a customer came to the airport and said, oh, I have an emotional support peacock. And in fact here's a picture of that peacock. I guess the people in the Zoom can't see it, but you can. And they didn't let the peacock on the plane. They treated it -- even though -- and they had documentation from a doctor how it was important to the person who lived in New York. This is Newark Airport. They were going to Los Angeles. And they didn't let them on the plane.

So my challenge is to convince you that the uptier transaction is more like the peacock and less like the other emotional support animals because then it should be treated differently. And so that's my -- so I didn't know that our friends at Gibson Dunn would have a dog and a cat. I have a dog and an emotional support peacock.

So that's my metaphor for today. I hope it --

THE COURT: I like it.

MR. SEILER: -- at least not --

THE COURT: I'm sure you'll read about it this evening.

(Laughter.)

MR. SEILER: Well, I don't know. They should credit Ms. Albom instead of me.

So let's just talk about the law a sec because I don't think we disagree about it very much. New York doesn't say if you strictly comply with the technical elements and the contract you can't have a implied covenant of good faith and fair dealing because then there would be no implied covenant of good faith and fair dealing.

So if we're thinking of a Venn diagram, there's some space where contract complied with but the covenant, which is implied, is not.

And this is in our brief, I won't spend time on it, it's a contract claim. It's not an equitable claim. It's you

can get damages for it. All we're seeking is damages for it. We address that in the brief. So it's an implied covenant.

Now, it can't contradict the contract, we know that. And it has to go to the essence of what you are trying to get in the contract. And that's why I put forward here, but we'll file this to the -- for the Court as well, but these are just cases we've cited in the brief.

And I want to say that before I go to the specific contractual expectation, the fact that the industry thought of loan agreements as loose or tight or somewhere in between does not change contract law. That is, it isn't the law that, well, if it's a loose agreement there's no implied covenant of good faith and fair dealing anymore than contract terms don't matter because it's a loose agreement. The terms still matter. This is one of them. It's an implied term.

And when they were testifying about loose agreement, they were talking about the existence of baskets where collateral could be carved out. And they were talking about the possibility of raising additional debt. Those were things that were in the time of whether all were loose or some were loose. When you had someone explain to you during the trial what does loose mean, those were the examples they gave.

It was not a contract law doesn't apply anymore because it's a loose agreement. And a little bit I think that was seeping into the argument. I think I still have to win

implied covenant of good faith and fair dealing. But whether it's loose or tight or in between isn't a legal doctrine.

And so let's look -- and I'm going to focus mostly on our claims against the lenders. A lot of what I say -- some of what I say applies to the company as well. And certainly what Mr. Lieberman talked about applies to the company as well.

But the key contractual promise we had from the lenders is in 2.18(c), which is the -- which allows us to purchase participations in their recovery if they get disproportionate recovery. That's the promise they gave to us.

And I think it's unambiguous in this case that that promise has been completely eviscerated by what happened because we're getting one percent now, they're getting all of the rest. They're not sharing it with us. And their technical argument, which you've ruled on, is that -- this is the bottom I highlight -- that Section 905 allows them to do an open market purchase.

But the question is whether even so, if doing that and the other things I'm going to talk about, totally eviscerate our expectation of getting this redistribution, if they got extra, that can still be a claim for implied covenant of good faith and fair dealing.

To put it in the language of the cases, these are

where our fruits are. Our fruits are if you get extra, you have to give some to me because you have to sell me a participation so I can regain my pro rata interest. I have other fruits from the company, which is to get paid pro rata in the first place to get my interest and principal and all of that.

But as to the lenders, this is the claim, this is the thing I was expecting to get. And so I'll just -- I'll leave that there and I'll just go to the next slide. The consent is required for a waiver. The -- it's unanimous consent is required.

So not only was this something I expected to get, it's a sacred right. And the industry calls it a sacred right. So it's a particularly important fruit that I was trying to figure out what fruit I should use to call it, but I figured I'd wear down my welcome with the peacock so I'll just say it's a particular important fruit.

And then if we go to the next slide, and it's not just that I felt that way. It has to be a reasonable expectation that that's what I'm going to get. And we all agree on that here. I don't think anybody has said it's a subjective interpretation. It's an objective interpretation.

And so if they do something that even though they're in technical compliance with the contract destroys an objective expectation, which I think getting this reallocation

was an objective expectation, then that at least has the potential of counting as a violation of the implied covenant and good faith and fair dealing, even if it isn't a technical breach of the contract.

And what I hope to show -- and there is no case that says and they have to have done it for an evil motive. There are cases that say when you have evil motives, that is further proof. And I'm going to use that way that, yes, there are some things they did here, not that many, but some that show evil motive. And I think you probably anticipate which ones I'm going to point to, but I'll get there in just a minute.

So I think -- and I just want to go to the next slide and talk about *Marblegate*, which we talk about in the brief. And I think it's important because it's the -- it is the most recent First Department case.

And it was in this space. It was a credit case. It was a different kind of transaction than ours was in an uptier. But it obliterated the expectation of the reallocation. And the court looked at the other things they did.

And if you go to the next slide, it enumerates them on the right side, which is quoting from it.

Some of it was secrecy, some of it was improper interaction with other parties. And I have -- I listed things I think they did.

So they -- so it wasn't a secret that the company was trying to fix its capital structure. And it certainly wasn't a secret to them that you could see a dropdown transaction as a mechanism to do that. I'll talk more about that in a second. But they were able to model almost exactly correctly what we were doing.

But it was a secret to us at the end of the timeline that they were doing an uptier transaction. And the only -- Apollo having asked Paul Weiss -- and we don't have Paul Weiss said because it's privileged -- asking about the possibility of something isn't the same as understanding that people are doing something.

And then at the end when they've done it, we don't get a chance to do anything about it. We don't get the chance to further compete with the dropdown transaction and we don't get a chance to try and compete to do the uptier transaction because they decided to go with the 39 percent.

And they had Barings sitting off to the side to bring it over the top to 50.1 percent. And they invited Angelo Gordon maybe, but Angelo Gordon said but we're still with Apollo and Gamut, and they said, no, you're not invited.

So that's the record here. So it was exclusive. And then I'm, you know, going through some of the things I want to talk about. The June 4th letter is a big deal, and we're going to look at it in some detail.

But they threaten the administrative agent, and they said things that weren't true. And so that's sort of the classic example of -- and the fact that they were hoping to win is no defense for doing that.

You don't tell people things that aren't true, important people like the administrative agent, and keep it a secret from the company because you know the company doesn't want you to be saying, by the way, we're insolvent. And we'll look at the exact words in a second. So they did that.

They demanded an indemnification. And I'm going to talk about that not from the point of view of whether it's okay under the bankruptcy law to be included in the exit financing. My friend, Mr. Hermann's going to talk about the confirmation impact of all that because he'll get it right and I'll get it wrong.

But it shows they were concerned. That's -- in fact, the one -- nobody knew what was in the indemnity, but they all knew they had to have it. And other than actually Mr. Greenberg's testimony, he seemed to know exactly why it was there. But he wasn't a witness here. He was making argument about it. But my hunch is but -- that he had something to do with the negotiation.

And then, finally, they add us to the disqualification list after the transaction, Apollo, Angelo Gordon, and Gamut. And that actually hurt us, right, because

we couldn't buy into their deal, we couldn't buy more of what we had because we couldn't buy anything. And they didn't need to do that either.

So I think we're going to look at the things they did. And they're not so different than *Marblegate*. I mean, they're not exactly the same but they're additional factual actions that are made that have the effect of hurting us and making it -- maybe making it more likely that we're not an effective competitor. But I don't think that is a justification if they're gratuitously hurting us.

So if we look -- I mean I've drafting some of it. We go to the next slide we should compare the dropdown IP company transaction with the uptier transaction. And let's just talk about the dropdown because they said some things in the closing that I don't think are quite fair.

So it is true that Angelo Gordon floated the idea of a OPCO transaction. But then the company did invite everybody to participate in doing a dropdown IP code transaction. That's what Evercore went out and told everybody they could do. So this was something that was openly encouraged by the company.

There were precedents that were well understood for dropdown transactions. They call them J. Crew transactions. You heard testimony to that effect. There was an express basket that allowed a certain percentage of the collateral to

be used for dropdowns.

And so nobody thought that there was something impermissible about that. It is true that some of the clients in their group didn't like those things because they bought the loans at a hundred and other people bought them cheaper so it made them nervous. But people understood that that was the risk.

Indeed, Mr. Chopra was able to model it. That was model 3-A and 3-B in his chart. So it -- even though he didn't know the terms. So -- and also so the collateral was available.

And, finally, the amendments to the loan documents were not required. You didn't need to change anything to do it. You could do it. We never get that far. I'm going to talk about it at the end. But you don't need to do it.

So go to the next slide. They explore this with our group, with Barings, which jumps from one group to the other and then back again.

And, yes, it's able to raise the money they want, okay. And, yes, it would let them do debt reduction, although when you look at those term sheets, a lot of the debt reduction was using cash at the end to buy back more debt at a discount.

And that's different, not in a way that maybe it mattered to the Court's earlier decision than exchanging debt

for new debt, which is what is in the uptier transaction. But those things were all there.

No one -- the company did not suggest it was a fraudulent conveyance. Barings did not suggest it was. Our clients did not think it was. You'll see in the June 4th letter there's that suggestion from Mr. Greenberg. But this was something that was well understood and explored by all these people.

So we go to the next slide.

And of course the Gibson Dunn group originally comes together, and they're institutions that don't like dropdowns. But they don't propose this new uptier. In fact, as you know, in the April 24th term sheet they say, we'll give you new money, we will let everyone participate pro rata. So that's where we were on April 24th.

And that's consistent with the expectations that everybody had. And so but now the question is, well, but they shift. And is that shift something that we should have expected or not?

So let's go to the next slide.

And I got all these people to acknowledge, and we'll go through them, that there had never been a priming financing with a debt repurchase at a discount where there were sacred rights and pro rata treatment. That's the unambiguous testimony from everyone.

And I don't think that pizza metaphor works because it would be, well, if there was ham and pineapple and pepperoni, but now you put it on a pizza together, that's not the same thing as knowing that you had ingredients that you could put on a pizza. It was important that these things were all put together.

And the one example they used on their -- in their show was Mr. Shah on the same page that I have from the transcript, page 83, where he said, well, there were things like this. But then he said, I can't affirmatively say that they did -- that they had all those things.

And then he went on to acknowledge that he couldn't disagree with Mr. Chopra when he said it was -- that there had never -- he'd never seen one where all those elements were there. And in fact that's when I asked him about Ms. Barrington's website, first of a kind, and he couldn't disagree with that.

So nobody is saying that all the components came together before. So we -- if -- now, maybe that won't be enough to convince you that this is a peacock and not an emotional support dog. But let's not pretend that we've seen them before. This is the first like this.

And I think that's kind of important because the difference is make a difference. So just think about the dropdown versus this in the most important respect of what

happens to the waterfall.

So in the dropdown, collateral that everybody knows could be put in a subsidiary gets put there. And now people own that and they are secured by that.

And everybody else is still secured by exactly what they had before except that there was some collateral that you thought might have been with you, but now goes somewhere else.

Here, you're in this group and suddenly everybody in your group has jumped ahead of you as to all the collateral because now they're superpriority above you by exchanging the debt that you thought was *pari passu*, that you thought that if they got extra, they'd have to reallocate it to you because you could purchase a participation, and now they don't.

Now, again, taking as given the Court's ruling that technically you could do that. But the expectation that that could happen, nobody has testified to that. No one has testified that they expected an uptier transaction, not any of these bankers. They were all asked that. They testified that there could be transactions that helped someone over someone else. But -- and we know that.

But not this where the one thing you thought -- and I realize the representative of Gamut didn't have hundreds of years of experience. But it's the absence of anybody testifying that there was an expectation that this could happen that's the problem because then the thing that you

thought you were getting has been taken away.

And then the question is, well, is that enough for an implied covenant of good faith and fair dealing or do we need more? I kind of think you don't need more, but we do have more. So what do we have?

First, we have the restriction of 50.1 percent. They allow a basket at the backend. But you saw the term sheets evolve. They need to inherently exclude people because that's the way they don't have to give a bigger discount to the company.

And that's inherent to an uptier. It's not actually inherent to a dropdown. There's a tradeoff, more people who are in. But it's not inherent that you -- there's no minimum in a dropdown. You can have less than 50 percent. But there's no need to come in really tight to a 50 percent. And so that, as you look at the transaction even without the other vino (phonetic) actions I think is something that they enforced on the company to get the best benefit for their group.

And I just want to take a look at the timeline for a second because I think they showed you a very --

THE COURT: So can we go back --

MR. SEILER: Sorry.

THE COURT: -- for just a second? Because I want to ask you. People have made much about this, about, well, it's

just a basket, and with an uptier it's everything.

But the testimony was that the basket had coverage. And so if the basket had coverage then it's always going to be the same net effect, is it not?

MR. SEILER: Well, I think the -- I guess if coverage means enough collateral so that --

THE COURT: Remember the testimony. There was --

MR. SEILER: -- the people who are lending --

THE COURT: -- an argument about it is it covered one time, two times, three times, --

MR. SEILER: Yeah, I got the --

THE COURT: -- and that went back and forth. But if it's always covered then isn't the net effect exactly the same?

MR. SEILER: So we don't -- so the net effect being the alternative transaction that my group was pursuing.

THE COURT: Well, just --

MR. SEILER: Or just in general a dropdown.

THE COURT: So whether you do a up-PET or a down-PET --

MR. SEILER: Well so --

THE COURT: -- the net effect is exactly the same to the nonparticipants.

MR. SEILER: No, no, no. So I think not. I don't -- because the company can't take all of the collateral that's

in the --

THE COURT: But --

MR. SEILER: -- base case and put --

THE COURT: But wait a minute.

MR. SEILER: -- it in the dropdown. It just --

THE COURT: If you have a secured debt, --

MR. SEILER: Right.

THE COURT: -- you're only the -- you're only entitled to be paid that which you're owed. So if you have coverage of-- let's just make it easy, a hundred percent. So if you're owed a hundred million dollars secured by a hundred million dollars' worth of collateral, all you can ever get is paid in full, right?

MR. SEILER: In the event of a default, okay.

THE COURT: Well, all you're ever entitled to be paid --

MR. SEILER: There's --

THE COURT: -- is paid in full.

MR. SEILER: Okay. I agree with that.

THE COURT: If you have a hundred million dollars secured by $200 million worth of collateral, you're still only entitled to be paid a hundred million dollars.

MR. SEILER: In the event of a dissolution, --

THE COURT: Doesn't matter.

MR. SEILER: -- yeah, in the event --

THE COURT: You're still only entitled to be paid a hundred --

MR. SEILER: -- where you get -- yes, you're still -- your entitlement to pay is your principal plus accrued interest.

THE COURT: Right.

MR. SEILER: That's true. I can't argue with that.

THE COURT: So why isn't the net effect exactly the same give the testimony that was undisputed that there was coverage?

MR. SEILER: So in the same -- remember, there's a universe of potential events, they testified about this. Somewhere the company just pays their debts as they go on and the transaction is relevant to the coverage. And then there's some where there's a bankruptcy.

And so let's imagine the one in a dropdown where the -- where it turns out to be good in the new subsidiary with the collateral it has and less good to have been left out of it, right, because there's not enough for both because you still have -- everybody who doesn't join the dropdown still has a secured interest in the other collateral of the company.

THE COURT: Right. But if you do --

MR. SEILER: So it only matters where there isn't enough for both. And so if your point is we can imagine a world where it's good to be in the dropdown and bad to be left

behind, that's what Mr. Chopra modeled for them, we can imagine that world.

And in our world we can imagine a world where it's good to be priority lender and bad to be an old 1-L with people jumping over you.

THE COURT: Sure.

MR. SEILER: So if you're asking as an effect could both turn out to be bad?

THE COURT: Well, I know they both can be.

MR. SEILER: Yes.

THE COURT: That's just a valuation issue.

MR. SEILER: Right. So but then the question is so is anything that puts you in the risk of that position all the same because it puts you in the risk, and I'd say no.

THE COURT: But the undisputed testimony was that there was coverage. I'm not telling you I believed it but that's the Record. The Record was there was coverage.

MR. SEILER: At the time of the transaction there and the uptier transaction.

THE COURT: So I'd have to go back and read it. I don't remember a temporal element being there. But I just remember the -- because I wanted to ask you this question because no one's dealt with it.

MR. SEILER: Well, I think they model a world in their model where they assume a bankruptcy in 2021,

December 31st, where there isn't coverage for the 1-L anymore. They get nothing. Isn't a -- there isn't full coverage in the priority group.

THE COURT: I'm -- all I'm trying to --

MR. SEILER: I don't --

THE COURT: -- understand is everyone let that testimony go. And I'm trying to figure out why.

MR. SEILER: So I'm -- maybe the why is we didn't fully appreciate it the way Your Honor is focusing on it. But I don't think it meant what you're thinking it means, that there was coverage and therefore everything's okay.

THE COURT: It wasn't that it's okay. I -- so when I -- and I want to -- and I appreciate everybody accommodating my new PET acronym. The point of saying what I said was I'm focused on effect, not what -- not labels. I'm focused on effect. And that's why I'm asking this question. If there truly was coverage, isn't the effect the same?

MR. SEILER: Well, I'm going to -- I have a -- I want to answer your question first, but I have a second answer that I don't want to --

THE COURT: Okay.

MR. SEILER: -- forget. But your answer I think not as to expectation, maybe as to in a world -- you can imagine a world where the effect under the same set of subsequent facts is the same. I think that that -- I agree with that. But the

expectation of that this could be done to you isn't necessarily the same. And so I think that's a --

THE COURT: Then can we go back to expectation --

MR. SEILER: Okay.

THE COURT: -- for just a second? So the expectation, as I understand the New York definition, is at the time the contract was entered into; do you agree with that?

MR. SEILER: It's the most -- I don't know that every case talks about it but it's the most logical --

THE COURT: I'm sure --

MR. SEILER: It's the most logical --

THE COURT: I've read more of them than I want to, let me start there. But I -- my memory is that it says at the time the contract was entered into. Help me understand, or is there an effect on expectation when someone comes in one year, two years, three years, four years later and buys part of the contractual basket of rights?

MR. SEILER: No. So I don't think the cases talk about that at al, but I could see why there should be, right? If -- for example, after this decision, --

THE COURT: I couldn't find anything.

MR. SEILER: -- if I -- if tomorrow, I don't know, someone goes out in the secondary market and starts buying debt in XYZ Co. after your decision and they say, well,

uptier, open market purchase, what is that, --

THE COURT: Right.

MR. SEILER: -- I don't -- and because, look, this was a loan agreement from 2019. I might say to them, did you not read the decision? Those are okay now.

And so I think that expectations could be at the time of the transaction, especially if you're a subsequent purchaser. But I don't think the cases talk about it one way or the other.

THE COURT: All right. So, but I mean, you do agree that there is case law that says it's at the time the contract was entered into.

MR. SEILER: Yeah. But I think it's designed to limit the claim that someone would make. So it's you have to be surprised -- yeah --

THE COURT: No, no, no. I'm just -- I want -- I'm --

MR. SEILER: I think so.

THE COURT: -- baby steps here. So, I mean, I think I've heard no one dispute, and everybody cites cases that says at the time the contract was entered into.

MR. SEILER: I think --

THE COURT: But you're not aware of any New York decision that -- this was my real question. Are you aware of any decision that talks about expectation by a, as you --

MR. SEILER: Secondary market --

THE COURT: -- defined it, a secondary market purchaser?

MR. SEILER: -- purchaser. I don't think that --

THE COURT: Okay.

MR. SEILER: -- I've seen that discussed one way or the other. But I could see why someone would make that argument against the Plaintiff.

THE COURT: I was just curious.

MR. SEILER: I --

THE COURT: I mean, again, I didn't see it and, you know, I was just wondering if there was --

MR. SEILER: But here --

THE COURT: -- a view --

MR. SEILER: -- whether it's 2016 or 2020 there hadn't been an uptier transaction, right. So the expectation issue is academically interesting, but I don't think it's practically different.

THE COURT: Right.

MR. SEILER: But the two that we have with I'll talk about, Envision and Mitel are that the credit agreements were before 2020, but the transactions that affected them were after 2022.

So -- and informed by Serta. I mean, these are called Serta transactions now. I mean, there's no -- you

know, it's not like -- just the same way dropdowns are called J. Crew transactions, these are called Serta transactions. We shouldn't pretend that people thought of this before us.

Mr. Greenberg came up with a very good construct, or his team, whoever did it, and that's what is now the Serta transaction.

THE COURT: Well I'm told that there's now a provision called a Serta blocker.

MR. SEILER: A Serta -- okay. So and it's apparently will be a PET -- I suppose if I lose this argument with you, that all PETs will be the same.

So I do want to -- so let me just talk about something and I'll come back to where we were. But I don't want to leave this out.

This -- there is evidence in the Record here that -- well, first of all, in our proposed findings and fact, we enumerate all the expectation testimony as proposed finding 77 through 80. So rather than -- I highlighted some of them but they're all enumerated there.

And then on this string-along argument, the timeline is the timeline. And at the beginning no one was thinking about an uptier transaction.

But there was evidence that Mr. Prince in particular was hoping to be able to do something with what became the Gibson Dunn group. And we have in our proposed findings at 20

and 21 the desire to get the process going with people like Angelo Gordon, but to be able to come back to the group who they knew were not that excited about dropdown transactions because they challenged them and hoped to do something with them.

And I have no doubt that if they had done nothing with them that we would have been I think what was it, the favorite horse or whatever it was in one of the emails talked about that.

But they had on their mind using us as the stalking horse for the other group. And there's documents in the Record and we cite them that show that. So it's not right to say it was a surprise to the company and to Advent. It was hoped for I think all along. And then things change and --

THE COURT: So if this group had done a dropdown that was just better than your dropdown, we -- you're telling me --

MR. SEILER: We --

THE COURT: -- we wouldn't be here?

MR. SEILER: We wouldn't be here.

THE COURT: And why didn't I hear that testimony?

MR. SEILER: Well, you heard that they invited -- why didn't you hear that testimony? I'm trying to think.

You did hear that we invited them to talk to us at the beginning. You heard that Apollo, they viewed this as a

negative, but that they offered them the $30 million to drop their deal and do the deal with us and that --

THE COURT: Yeah, no, they --

MR. SEILER: -- we were going to compensate them because they had a higher basis --

THE COURT: Sure.

MR. SEILER: -- than we did.

THE COURT: And they're suggesting that was a bribe. I got that.

MR. SEILER: Yeah, but it wasn't a bribe. It was a --

THE COURT: I --

MR. SEILER: -- compensation --

THE COURT: -- for -- I want to make that clear. I wasn't suggesting it was. That's just why --

MR. SEILER: But that was an invitation --

THE COURT: -- they put that out there.

MR. SEILER: -- to their group to do it all together as a dropdown. And I think that that's -- we weren't -- the only person who said there's anything wrong with the dropdown is Scott Greenberg's letter on June 4th to UBS that said it might not be legal.

THE COURT: Well, the only person that says there's something wrong with an uptier is your lawsuit.

MR. SEILER: Well, if -- I have a lot of people

who've joined in with me. And LCM, don't forget the LCM lawsuit.

(Laughter.)

THE COURT: No, they don't want to be here. That's --

MR. SEILER: No, but I think I can't tell you what would have -- because, here, this takes me to where I was going on the -- we don't know what our transaction would have looked like because they stopped talking to us before June 4th.

And so we don't know, for example, would other people have been invited to participate.

THE COURT: Right.

MR. SEILER: We don't know for -- and so that takes us to the next slide because I listed them.

We don't think an amendment would have been required.

There was in our proposal the idea of using open market purchases. But we don't know if we would needed to have done them.

And we don't know whether anybody would have complained. And, if they did, you know what we might have done? We might have included them because when you look at these other cases, like *Revlon*, when people complain, they go to court and things get worked out or the judge rules and then

things get worked out.

So the you tried to do it, too, I think we talked about this in summary judgment, we didn't get to the end of what it was. And we didn't find out if it -- how different it would be.

So just take the one example potentially open to all. There's nothing to stop -- and Mr. Chopra admitted there was nothing technically to stop them letting more people in except that they didn't want to.

THE COURT: Right.

MR. SEILER: And I concede that we weren't going to them and saying, do a dropdown and invite everybody. But if they'd come back and said, we've been working with this Gibson Dunn group, you need to include them, some of them want to be in, these are the terms, we don't know that that wouldn't have happened. And we don't know that we wouldn't have been here. If it'd been worked out we probably wouldn't be here.

I mean, you have -- in Envision, which they talk about in -- at length, in Envision, the first transaction was just new money from Angelo Gordon. That's in the documents. And that's, by the way, where that somewhat similar but not exactly the same indemnity language shows up, which I'll get to in a second.

But then when people complain, they had a second thing where 97 percent were in and 3 percent weren't and they

were complaining. But now Envision is filed next door here and this isn't going to happen in that case I don't think because it all got worked out in sequential transactions along the way.

So I think the answer to your question is I don't know what would have happened. But there's no reason to assume it would have been exactly the same fight.

And so let's talk about the June 4th letter because I think that that's -- oh, by the way, before I do, I talked about the $30 million payment. They say, well, we were sticking together as a group. Okay. But that's because they tried to pick off one of the members of their group and the group decided we should talk to them together, Apollo, Angelo Gordon, and so I don't think there's anything wrong with that.

And the third thing they said that we did that was bad was we brought litigation. And I believe you have a right to bring litigation if you think someone has violated your right, that's not a sign of bad faith.

THE COURT: I agree.

MR. SEILER: So let's talk about the June 4th letter. And let's look at the slide where it's highlighted.

First, they -- and they talk about this very briefly in the presentation that Mr. Costa made. And the -- but the letter I found striking because it first suggests on the page I've highlighted that they're going to take steps to stop the

transaction. They do not believe that it's permitted under law. And that I thought was bad enough.

But if you go to the next slide, they say it may constitute an actual or constructive fraudulent transfer, okay. And they hide behind the word "may," you heard that in the testimony.

THE COURT: Right.

MR. SEILER: But then they say it is highly likely that the company may very well already be insolvent. And they had no factual basis to mention that at all. And they hadn't done the analysis, the company hadn't, Mr. Chopra hadn't. He knew about this letter and didn't stop it from going in, that's what his testimony was.

And it’s a little unclear because of the timing when on June 4th it happened. What we know is that Mr. Chopra learned that he was chosen on June 4th, and we learned that this letter goes in, the email shows 7:32 I think. But I don’t know if this went before or after, I don’t want to suggest I know, but it’s the same day. And then June 5 they tell our side that they lost June 8, they signed up enough people to get over 50 percent, and then June 22 they sign definitive documents. That’s the time line.

But what’s the -- so why is this okay, to send a letter to an administrative agent saying that a company might be insolvent when you have no basis to say it, and no

belief -- no factual basis to say it, no belief to say it. If they believed it was insolvent, why would they be doing the uptier transaction with them?

So this is entirely designed to stifle -- well, if that's the case, then it wasn't -- because remember, the testimony was, well, we hope everybody gets paid, everything will be great.

THE COURT: Sure.

MR. SEILER: I guess they're giving them extra money but they're an extra day equal for the extra money, so, I'll stick with my first one. We don't have any reason to think they thought any of us lenders thought this company was insolvent. We had testimony from one of them that they had done a -- that they looked at it, too, and that it wasn't -- I think C-SAM it was.

So I don't think this is okay. And I think it's -- and they knew it wasn't okay because they were at the end, don't tell the company. So if this was the only thing we had on top of our expectation being eviscerated, I would say, oh, implied covenant of good faith, fair dealing problem for the lenders. Not for the company, but for the lenders.

And so if you were to -- well, I realize I'm probably not going to convince you from all the things that happened, but if you were to decide, you know, you have a point, that's a problem, I'm not going to grant what they

want, I'm going to find against them, I still have to come back and prove damages. I don't know how big they'll be, but there's going to be a fight when you measure them and how you measure them.

And then we learned from Mr. Greenberg that his clients have -- as important as that indemnity is, if you confirm the plan, they haven't even decided if they're going to seek to enforce the indemnity. They'd have to see at the time. Now he was thinking at the time if the 5th Circuit were to reverse the decision and rule on the contract claim. But the same would be true on the good faith and fair dealing. They don't know that they would even seek to enforce the indemnity.

So I'm not the bankruptcy guy, that's Mr. Hermann, he'll -- but I don't see how this gets in the way, given that testimony this gets in the way of the plan, and this is certainly not my area of expertise, but I don't see how there's an equitable mootness issue. He's basically saying, I don't care what happens here, we'll fight, we'll decide, if we lose, whether it's worth seeking the indemnity. We'll have our ownership interest then and we'll work it out.

THE COURT: Yeah, you don't have -- you don't have to worry about equitable mootness in this Circuit.

MR. SEILER: Okay.

THE COURT: It doesn't exist.

MR. SEILER: Oh. But I -- if they stood up and said they agreed with you, I would be more comfortable, but I'll leave that to --

THE COURT: They'll stand up and say almost all the decisions find that there is no equitable mootness.

MR. SEILER: All right. Well, anyhow, so I think to that -- so I -- just to close out the area of what I'm talking about then -- so we have -- we go back to the slide that has the A and B, there we go. So they redistribute the waterfall completely.

THE COURT: Yeah.

MR. SEILER: Different than the side-by-side transaction --

THE COURT: And to be fair, to say on a waterfall intact is not really correct. Right? Because you moved -- you moved --

MR. SEILER: I moved collateral that I was allowed to move, but as to the collateral that remains --

THE COURT: Then you created --

MR. SEILER: -- the waterfall's intact.

THE COURT: -- you created two waterfalls, and so by saying that the waterfall's intact, a little -- it's a little disingenuous.

MR. SEILER: I don't know it's disingenuous, but I'll take your friendly amendment that there's two waterfalls.

THE COURT: Yeah, okay.

MR. SEILER: Okay. And clear precedence for it as opposed to first of its kind, potentially open to all because we didn't score it all the way, but some of these dropdowns have been opened to all.

THE COURT: Yeah --

MR. SEILER: This one is inherently restricted, amendments not required versus amendments required, and then I briefly talk about what the amendments do. Right? They allow for further subordination that only helps -- that only hurts us --

THE COURT: Right.

MR. SEILER: -- and doesn't hurt them. They actually say that that subordination is not a default, they changed the documents to say that. So those were -- and then you have the arguments that LCM made that I won't repeat, and they put us on the DQ List.

So we have a bunch of extra things that they did that hurt us that aren't explained by just getting the deal done. So they're incremental, which meets this test of it's not just the same thing, and they're bad for us and it's -- there's no case that says, well, I was afraid that I'd lose money if I didn't do this to you. None of those cases they cite, I read every single one of them, none of them say that.

And it's not the law that you can -- you know, the

law is, if you breach a contract, whether it's express term or implied covenant, you can pay damages --

THE COURT: Right.

MR. SEILER: -- for area contract.

THE COURT: Can we go back to the DQ List for a moment?

MR. SEILER: Okay.

THE COURT: What's the impact -- so you're suggesting that being put on the DQ List means something bad. But --

MR. SEILER: Right. So it means you can't buy so --

THE COURT: No, I know what it means --

MR. SEILER: Okay.

THE COURT: -- so but now you've now agreed that you're on the DQ List. What's the impact of all of that?

MR. SEILER: All of my clients -- so they can't buy any of this wonderful new debt that's going to turn into equity in the bankruptcy --

THE COURT: Right. I'm trying to figure out --

MR. SEILER: -- so they can't hedge their position --

THE COURT: -- I got -- I know what happens. What I'm trying to understand is what's the impact of actually going on the DQ List as part of the settlement that you announced?

MR. SEILER: Or at the --

THE COURT: So --

MR. SEILER: I'm sorry.

THE COURT: -- Apollo announced the settlement --

MR. SEILER: Oh, that's the old DQ List where we couldn't -- before June 20 --

THE COURT: Right.

MR. SEILER: -- we couldn't buy -- this is being put on the DQ List post-June 20 of 2020 and so it's not -- they're totally separate.

Now we can't buy any of the old debt and we can't buy any of the new debt. And so that means we can't mitigate our damages. We could, for example, if there were -- if Eaton Vance wanted to sell because they're worried about the company, and we're more optimistic about the company, before this bankruptcy is confirmed we can't buy the debt.

THE COURT: I got how it works. What I was trying to understand is what is the impact of complaining that you're on the DQ List and then turning around and agreeing to be on the DQ List? I think you've told me is that you ascribe value to time.

MR. SEILER: Well, so first of all, Apollo was the only one that was accused beforehand, not my other clients, not --

THE COURT: But you do represent Apollo.

MR. SEILER: I'm saying --

THE COURT: Okay.

MR. SEILER: -- so they agreed -- a settlement was agreed to and it's less good to be able to clear half your trades than all your trades, so that was the settlement of the dispute about whether they were entitled to or not. But you -- all else equal you don't want to be on a DQ List because it limits your options.

THE COURT: I totally got that. I'm trying to understand the impact of you agreeing to be on it.

MR. SEILER: My agreement on --

THE COURT: You're complaining that they --

MR. SEILER: Oh, so --

THE COURT: -- put you on it, and then you turn around and agree to be put on it. That's what I'm trying to understand. And maybe this is a rabbit trail --

MR. SEILER: All right. So for -- I think I understand it -- so for Apollo the question is what's the effect on their ability today having agreed last week to settle half the trades and be on the DQ List.

THE COURT: Right.

MR. SEILER: And the answer is, there's nothing to stop them tomorrow from agreeing to not be on the DQ List. One, it's not forever, it's for now, but if -- to the extent that they're on it for future trades in Serta they're -- the

settlement didn't make it worse because Serta had put everybody on the list in my group --

THE COURT: Right.

MR. SEILER: -- prior. So it didn't -- agreeing to it, it didn't affect that designation one way or the other, it was just agreeing to it as to the -- what was in dispute in pre-2020.

THE COURT: I'm going to chalk this up that I asked a bad question.

MR. SEILER: Well, I don't know if that's true, but it took me a while to get to an answer, maybe it's -- so let's talk about the indemnity.

THE COURT: Okay.

MR. SEILER: Or at least the facts of it. And so if we go to -- there we go. So, and the Record is clear from the documents, 903B has carve outs for gross negligence, willful misconduct, bad faith and material breach. And we walked through them with the witnesses. And on June 20, 2020, the day that the Finance Committee and the company approved the deal, they still had those carve outs. So they weren't -- there was no exception to the carve out on June 20, 2020.

THE COURT: Uh-huh.

MR. SEILER: We go to the next slide, what I call the 19 words, which I hope I counted right, the excluding for these transaction from the carve outs, and that shows up on

June 22. We have heard absolutely no testimony from anybody about how we got from June 20 to June 22. Not from the company, not from the lenders, not a word.

And so we've heard a lot of testimony from people that really want the indemnity, but most of those people couldn't tell you the difference between the two versions of the indemnity. And I think we'd all agree that the as modified on June 22 indemnity is more valuable to the lenders than what they had before, because it carved -- taking the things we're accusing them of, primarily a material breach of contract, then saying, well, but not if it's from this transaction you just did. That's a pretty big change.

So if you carve out material breach of contract, they're on the hook, if you un-carve it out with the exception, they're off the hook. And we don't know how it got there, we don't know what the company got for it, and we heard no testimony about that evolution as of the time of the contract in 2020.

And I think this next slide repeats it.

So we've heard now from Mr. Schrock today --

THE COURT: Right.

MR. SEILER: -- that he says it was reasonable. We heard from Mr. Greenberg with reasons why the lenders want it. None of those people testified under oath or were subject to cross-examination. Closings are not evidence. The

evidence --

THE COURT: Right.

MR. SEILER: -- on this evolution and why it's there and why it's important now is from people who says, I wanted an indemnity, I really wanted an indemnity, I wouldn't have voted for it, but it was indemnity.

And then yesterday, or maybe it's the day before, they took out the people who were -- are no longer holders of the PTL debt anymore from being indemnified. And so -- and there are some of them, because new people had purchased.

THE COURT: Sure.

MR. SEILER: So they were able to change the indemnity for the people whose votes they don't care about, I guess people didn't vote probably because -- well, we don't even know, they could have voted for the plan and sold subsequently, but they took them out, and so that's the evolution of the facts of the indemnity.

The question you asked me the other day is why do I care? And I'm going to let Mr. Hermann tell you why I care in the context of confirmation. But I care for the good faith and fair dealing because I think it illustrates an understanding that being protected against the claim of material breach was something they really, really wanted. That's what they all say.

And that's an acknowledgment that there's something

to worry about. And it's not just, oh, you sued us, because people get sued all the time and they don't get indemnities with blanket carve outs for things that are actually void from public policy. The gross negligence and willful misconduct typically is something you can't indemnify. And the cases don't all say it's only for future acts. There are cases that say you can't indemnify people for it, period, that are cited.

So they got that, they insisted on it, and they don't know why, and they company gave it and we don't know why. That's the factual predicate, and I think it's relevant to thinking about their state of mind, and that's why I talk about it in this --

THE COURT: I got it.

MR. SEILER: -- part.

And so let me just see if I -- I think I -- yeah, I think I covered that. So I'm going to go to the other transactions for just a second. And they talk about this more in their brief than they did today, but first we'll go to the prior -- keep going -- there we go -- one more, one more, there we go.

So you have transactions that took place before this deal. And if we go to the next slide, I've actually annotated it with the -- there you go -- with where you'd find it in the Record.

But they're all either drop-down, or they were open

to all or they didn't have pro rata sacred rights, and none of them are this case and none of them, just consistent with what I said before, but they talk about them. They had people say, well, what about -- you know, what about -- I remember J. Crew, I remember *Trident*, but they never told you why they thought they were relevant precedence for the uptier. And in the Record either people said they're weren't, or they're the documents themselves.

And if we go to the next slide, for Envision, so both of the Envision and Mitel transactions took place after this happened. The underlying credit agreement was earlier, but the transactions that people complain about were after. Envision was multiple transactions and the one that Angelo Gordon participated in was just new money. And they had a debt-for-debt exchange that was open to all, and the waterfall was not a sacred right.

So, and like I said, no one's complaining because they did the subsequent transaction that let 97 percent of the people in, and so -- and, but most importantly, it was informed by Serta. And by -- not by your decision yet, but by Judge Maisley's decision not to enjoin the transaction. And then Mitel, which is even later, it's been subject -- Apollo got sued for that.

So, you know, I'm not going to litigate the Mitel case in front of Your Honor, but that has hardly been

established to be okay. It's just been established to be under attack. And I don't know the answer to what happens if you rule with me and you say this is good faith and fair dealing that's been violated and we have a damage trial, we get paid our money, or the 5th Circuit reverses on the interpretation of open market purchase, I don't know what that all means for the Mitels of the world. And the ones that I told you last time I think are sure to come now.

THE COURT: Right.

MR. SEILER: And so, but I don't think any of that tells you the answer to whether we're entitled to recovery, there is no you have to act pristine in every other transaction rule on a breach of contract claim.

So I want to talk about one more topic and then I'll let Mr. Hermann talk. And this -- and I say this, you know, trying to be completely respectful. I think Mr. Costa said, in criticizing the LCM, the ship has sailed, you can't re-litigate the contract claim that's been decided.

THE COURT: Uh-huh.

MR. SEILER: And the contract claim that has been decided certainly is that this is an open market purchase in Your Honor's eyes. And they have submitted, and they're not all equally, in my view, inappropriate, but they have submitted proposed findings of fact that look to me like they're trying to gild the lily, improve the findings, add to

the Record. And I don't think, and we briefed this in our brief, I don't think they can do that --

THE COURT: Right.

MR. SEILER: -- for the 5th Circuit now and I don't think they can pre-do it anticipating the possibility of a remand and have findings that have already been made. And why we say that in the brief that you read and I didn't want to spend time on it is, we didn't think that was the trial we were having, that was not the discovery anybody let us have, and your decision is your decision.

And this -- I think if this is what they're doing, you should -- I don't know how you were going to do proposed findings and conclusions, but I highlight here on this page and the next one findings that I think go further. For the one that is worse is 207, they say, has only been confirmed on the fuller trial record. No. This trial was about good faith and fair dealing. It's not about the definition of open market purchase, and it can't either confirm or disaffirm their earlier ruling.

And I think that in going through your decision, you should be careful, I respect -- most respect not to act on something that you no longer have jurisdiction on to give them something --

THE COURT: No, I don't have --

MR. SEILER: -- that's helpful.

THE COURT: -- I don't have jurisdiction over the adversary, but I have all the jurisdiction in the world with respect to confirmation. And the issues were tried as part of confirmation. There's an awful lot of testimony that was surprising to me that if it didn't step over the line, it was right there on it.

So I fully understand what I can talk about and what I can't talk about in terms of the adversary. But there is no appeal in the main case with respect to confirmation.

MR. SEILER: Fair enough. Then I just would stress the point I made which is that, and this is in the Record attached to our brief, discovery was restricted against anything that looked behind open market purchase.

THE COURT: Well, you --

MR. SEILER: There was --

THE COURT: -- you better than anybody understands the concept of trial by consent.

MR. SEILER: Well, there's an overlap between expectations about what the fruits were and the definition. And to the extent there was -- I'm sorry, Your Honor.

THE COURT: My apologies.

MR. SEILER: -- and to the extent there was testimony that is in that overlap and it leads to findings in your confirmation, that'll be fine. And I'm just saying to you with respect we might reserve our right to object to the

confirmation order to the extent it does something more, and more importantly the parties try to use it for something more, that's all I'm saying so I'm not --

THE COURT: I fully understand that and you know that doesn't bother me one bit.

MR. SEILER: Well, then I was trying to get through this whole thing without bothering you one bit, and I think I'm going to turn it over to Mr. Hermann.

THE COURT: No, no, no, I mean, look, it has been a pleasure to watch you be a litigator.

MR. SEILER: Oh, that's very generous.

THE COURT: It's a wonderful skill set. I wish you could infest all those around you with what you have. It's been a pleasure to watch you do your trade.

MR. SEILER: Well, Your Honor, it's very generous to say that. Usually it's followed by my losing completely, but I'm going to turn it over --

(Laughter.)

MR. SEILER: -- to Mr. Hermann.

THE COURT: You have made your case. I got it.

MR. SEILER: Thank you very much, Your Honor.

THE COURT: Thank you.

Mr. Hermann?

Can I do one thing before you start?

MR. HERMANN: Of course.

(The Court confers with the Clerk.)

THE COURT: All right. My apologies.

MR. HERMANN: Not at all.

Good afternoon, Your Honor. For the Record, Brian Hermann from Paul Weiss Rifkind Wharton & Garrison on behalf of what I call the Ad Hoc Group of First Lien Lenders.

CLOSING ARGUMENTS

BY MR. HERMANN: Your Honor, we filed an objection to confirmation to the -- of the Debtors' plan at Docket 824. And our objection really focuses on two things. One is the provisions dealing with the indemnity, the other is the absolute priority rule, which is the tax treatment relating to the existing equity. And I want to address each separately, and I'm going to start with the indemnity claim first.

Let me start, Your Honor, by saying, to be crystal clear, after all of this these Debtors deserve a fresh start. And we have an issue with the lenders, we get it. That issue is not going to go away, you heard that. But these Debtors deserve a fresh start.

But the indemnity and the continuation of the indemnity is really undermining their fresh start. And I heard what Mr. Greenberg said, maybe we hit the indemnity, maybe we don't, we'll judge it at the time. But there's no question that the indemnity is a cloud over this company that will not be lifted until the litigation is finally

adjudicated, and that is going to take some time.

THE COURT: Right.

MR. HERMANN: So I do think that is impacting their fresh start.

Now the indemnity has had many lives and has lived in many documents, and I just want to trace the existence of this indemnity because I think it's important. It started out with, you know, the 19 words that Mr. Seiler points to, they didn't even exist when they announced the deal, then they got into the deal, I'm not going to re-argue that. But it started out in the pre-petition priority term loan agreement.

Then the company filed for bankruptcy. Importantly it did not exist in the term sheet for the exit financing. When they filed their -- when they signed their Restructuring Support Agreement and when they filed it with the Court, there was no indemnity in the exit financing. So it cannot be stated today that that was a critical component of the exit financing because it didn't exist in the term sheet that they signed when they started the case.

Where it did exist was in the plan. And it existed in a provision that admittedly is in a lot of plans and admittedly does not get objected to in a lot of plans, but is problematic. Because what they did was they took a specific provision of a financing contract which cannot be assumed and they pulled it out and said, we're going to treat this as

though it's an executory contract, we'll deem it an executory contract and assume it.

You can't do that, and we objected on that basis and they took it out.

THE COURT: I think I made a comment about it, too, didn't I, along the way?

MR. HERMANN: I think you did.

THE COURT: Yes.

MR. HERMANN: Yeah. So, sure, if everybody's consenting to many plans and maybe, you know, after this people will look more critically at it, but maybe it's fine. But here, it didn't work and they took it out of the plan.

So then if you take it out of the plan, that claim which exists has got to be treated. And it is not -- Mr. Greenberg made the comment, We have a bunch of claims under the agreement, we filed a Proof of Claim, they're all being treated under the plan.

This is a very different claim because the way they set up that indemnity is they put it at the top, the very top of the waterfall. It is the most senior part of their term loan claim, and then the principal and interest comes after it. So somehow it has to get treated under the plan. I suspect they didn't want to treat it under the plan because of 502(e)(1)(B) which I'm going to get into. And so they didn't treat it under the plan.

THE COURT: Right.

MR. HERMANN: Instead, what they did was they put it into the exit financing at the very last minute and said, neat trick, we'll take it out of the plan, we'll put it into the exit financing and we'll just carry it forward that way. And to me, Your Honor, that's like laundering a claim that should be disallowed under the Bankruptcy Code through a different instrument, and I'm going to tell you why that doesn't work either.

THE COURT: Okay.

MR. HERMANN: And so -- but let me start with the -- lay some foundation. So if you start with Section 1129(a)(1), it says that very basic provision in the plan needs to comply with all applicable provisions of the Bankruptcy Code. Not a controversial topic. And then (a)(2) says, the proponent of the plan, the Debtors, needs to comply with all applicable provisions as well. Okay.

So what is the plan? The plan is the Chapter 11 plan, and the way they've defined it, it also includes all of the attachments to the Chapter 11 plan which includes the plan supplement which includes the exit financing. So using their own terms in the plan, the plan as defined includes the indemnity. And I don't think there's any -- now the mere fact that they stuck it in the exiting financing has got other problems, but there's no question that by doing it it's still

part of the plan.

So and, you know, let me say this, we heard at the outset there's a lot of settlements embodied in the plan, there's business judgment, but the plan itself is not a 9019 settlement. It can embody a 9019 settlement, but the plan itself is not a 9019 settlement. So all of this talk about settlements and treatment of claims, and RSAs and business judgment are sort of irrelevant when it comes to 1129. Because what Congress told us is that with respect to a plan you either comply with 1129 or your plan can't be confirmed, notwithstanding the benefits of settlements and gives and gets and business judgment or any of that stuff.

So let's look at whether they can comply with 1129. So I'm not going to go through the specific provisions of the indemnity, and I think they've already been well covered, and again, Your Honor, we're not here objecting to an indemnity in the exit financing, they can have an indemnity in the exit financing, it's really just the 19 words that are the problem that we have with the indemnity.

So let's look at 502(e)(1)(B), which we think clearly applies. And let me also state that 502(e)(1)(B), there's no discretion for Your Honor in 502(e)(1)(B). If it applies, the claim shall be disallowed.

THE COURT: Agree.

MR. HERMANN: so there's three elements, they don't

contest two of them, they only really contest whether or not there's co-liability. And so let's look at what that means. I think that a good place to start is the *Drexel Burnham* case in the Southern District of New York, which we cite in our papers, 148 BR 982, the quote that I'm going to read is at page 986 and it's Bankruptcy, Southern District of New York, 1992. And in talking about co-liability what the Court says there is that the proper standard for determining co-liability is whether, quote, "The causes of action in the underlying lawsuit assert claims upon which, if proven, the Debtor could be liable but for the automatic stay".

There's no question that our lawsuit and their own lawsuit against us contains claims that, if proven by us, would create liability for the Debtor and would create liability for the lenders. So I don't think the co-liability issue under that definition is really problematic. Now that's just one of several cases, Your Honor, that confirm that co-liability exists whenever a Debtor and an indemnified non-Debtor are subject to litigation asserting money damages for the same harm.

Now I think it was in Gibson Dunn's papers where they say, well, we have said, and Mr. Seiler I think has said very eloquently, that in the good faith and fair dealing context it could be that we have a good faith and fair dealing claim against the lenders, but maybe not against the Debtors

because different behavior could give rise to a different claim. But that doesn't mean that they could not be -- both be liable for a breach of contract, and that's the essence of our claim.

The other thing that I would say about the co-liability argument that they've made in their papers and that Mr. Greenberg reiterated again today is that it undercuts the argument that they made to Your Honor in connection with the stay hearing. Because in connection with the stay hearing what they said was that there was an identity of interest between the Debtor and the lenders which necessitated a stay of our New York litigation against the favored lenders.

And specifically what they said is the following quote, they said, "Indeed, a judgment against the non-Debtor parties concerning the priority of the 2020 transaction would necessarily be a finding that the Debtors also breached the 1st lien -- the 1st lien term loan agreement."

And so they've essentially conceded, I think, that there is co-liability. So if you have co-liability, together with -- it's a reimbursement or contribution claim, courts have found that indemnity is a reimbursement or contribution claim and we know the claim is contingent, I think we have satisfied that statute.

Now so if we have satisfied the statute, and if you accept that the plan is -- encapsulates the plan supplement

and the plan supplement contains the exit financing, and the exit financing contains the indemnity, the plan essentially is letting ride through indemnity that should be disallowed. And that is a violation of Section 1129(a)(1).

Now if you don't believe me on that, Your Honor, there's another section that is implicated by the indemnity and that's Section 509(c). I'm not going to spend a lot of time on it here because we briefed it, but 509(c) similarly says even if you fix a portion of the claim, that claim has to be subordinated until the party that is bringing the lawsuit, us, gets paid in full. So what you have here is a situation where you have a claim that's disallowed that's riding through, or alternatively a claim that should be subordinated that's riding through. Either way that's a violation of 1129.

So we don't think that the plan can be confirmed with the indemnity riding through. Again, if they want to modify the indemnity, take out the 19 words, we're gone on this issue. But if they're going to leave it in, we don't think that that can be approved.

Let me go through some of the arguments that they've made in response to the argument that I've just made in the papers.

THE COURT: Okay.

MR. HERMANN: First, they say we didn't object to their claim, which is wrong. We did file a claims objection

prior to the expiration of the challenge deadline. It's at Docket 656. And so -- and we didn't need derivative standing to do it because any party-in-interest can file a claim objection, so I think that takes care of that.

And along those lines, Your Honor, when we get to the end, no matter how Your Honor rules, we would like the findings and conclusions that are in both the adversary proceeding proposed findings that the Debtor and the favored lenders put forward, as well as in the confirmation order, that say that no party has filed a timely challenge should come out, because we did file a timely challenge.

THE COURT: So if it helps you, just I am not one of those people that take one party's findings of fact and conclusions of law and signs them. I appreciate that a lot of hard work went into everybody submitting them. What you will get from me is -- are my words, my opinion.

MR. HERMANN: I didn't think you were, Your Honor, but I just wanted to --

THE COURT: No, I want everybody to know --

MR. HERMANN: -- didn't want that to unstated.

THE COURT: -- I didn't -- it's I don't think I've ever signed anybody's findings of fact and conclusions of law, except those contained in an uncontested confirmation order.

MR. HERMANN: Thank you, Your Honor.

Next, you know, I think, candidly worried about this

502(e)(1)(B) argument. They stick the indemnity in the exit financing and kind of say, well, this is a new loan agreement with a new indemnity, but --

THE COURT: Right.

MR. HERMANN: -- oddly the new indemnity up until yesterday I think was indemnifying people that participated in a transaction three years ago who no longer own the debt. They kind of figured that out. But there's no way that that would make any sense. Right? People entering into a new loan agreement are not going to indemnify people who aren't parties to the loan agreement, but did something potentially wrong in 2020.

But more fundamentally I don't think that they can just -- it's not a question of where the language lives, it's a question of can this claim survive? And so I don't think that's appropriate, and as I said, I don't think that they can be saved by necessity. You know, we hear all this testimony about we need an indemnity if we're going to vote for the plan, or we're going to do the exit financing, or any of that.

Mr. Seiler, I think, handled that well enough that I don't need to go over that ground again, but as I said at the beginning, the indemnity that the lenders wanted in the exit financing didn't include this language. So they can't say they needed it because it didn't exist in the term sheet that they attached to the RSA.

Next we heard that, you know, Mr. Schrock, I think, said this, well, it's a 9019 settlement, or it's a settlement, he might not have used the words 9019, it's a settlement and we're allowed to settle things under a plan. Sure, you can do that, but the 5th Circuit, like other Circuits, including the 2nd Circuit in the *Oweeko* (phonetic) case said, you can't through a settlement do something that violates Section 1129.

So if I'm right that the indemnity is problematic under Section 502(e)(1)(B), they can't then say, well, it's just a settlement because you can't settle something that also violates Section 1129(b) -- I'm sorry, 1129, particularly in connection with a plan. So I think that argument fails.

So I think any way you cut it, they've got a problem wit the indemnity under 502(e)(1)(B) and it should be disallowed.

I'm happy to answer any questions you have on that topic before moving on.

THE COURT: So I just have one for you, so let's assume for a second that, you know, you've got a situation where you had an indemity, 502 says goes away, and then do you believe in a plan that there could be an exchange of a consideration and a new indemnity given, whether the words are exactly the same, slightly different, I think that's largely irrelevant. But do you think that if there is sufficient consideration given, and the other requirements under *Oweeko*

or *Foster Mortgage* or *Jackson Brewing*, whatever 5th Circuit case you want to choose, do you think that that can be done?

MR. HERMANN: I think that if you have a contingent indemnity pre-petition that is subject to 502(e)(1)(B), I do not think that you can somehow settle that claim and allow it. Maybe if nobody objects, maybe the Court lets it go, but I don't think you can do that.

THE COURT: So let me give you the argument that at least I think is being made, is that we have a billion dollars worth of claims and in order for the company to succeed the capital structure's got to be redone, so we will do the following: We'll consent to the conversion of our claim to equity and in exchange for that, you give us back an indemnity because we know we lost one that we had when the case was filed.

Can you do that?

MR. HERMANN: I don't think so because I think that it's tantamount to the pre-petition indemnity riding through the bankruptcy unimpaired and I think that's exactly what 502(e)(1)(B) is saying you cannot do.

THE COURT: The fact that you paid for it, doesn't change anything.

MR. HERMANN: It doesn't.

THE COURT: Interesting. Okay.

MR. HERMANN: Your Honor, the next -- so that's

Objection Number 1.

THE COURT: But they --

MR. HERMANN: Yeah.

THE COURT: -- but they have said, we'll convert our billions dollars worth of claims to equity and you agree to buy us an insurance policy for $500 million.

MR. HERMANN: Yeah, I think they can do that.

THE COURT: So it's -- because an indemnity really is no more than -- it's a different type of insurance policy. Right?

MR. HERMANN: It is, but it happens to be one that the Bankruptcy Code says has to be disallowed.

THE COURT: Oh, I got it, I'm not disputing that, I'm not disputing it says that, but in terms of replacing that right you're saying that assuming that I pay for it, and assuming that I pay enough, you're saying I could go to AIG and buy a policy which would cost money, but I can't go to the Debtor and get an insurance policy from the Debtor.

MR. HERMANN: Well, I would say this, two things, one is I think if they went to AIG to get the insurance policy, I don't think they'd get the indemnity that they have from the Debtors with the carve outs from the carve outs.

THE COURT: I was trying to make it apples-to-apples.

MR. HERMANN: Yeah.

THE COURT: I got those arguments that you're making, I was just trying to understand why is it different who issues the insurance policy if you're telling me one's okay and one's not?

MR. HERMANN: Because I think -- well, I think that if this was a normal -- forget the litigation, if they had gone out to a third party to get exit financing, like Citadel, and Citadel said, we'll give you exit financing, but we want an indemnity, a standard indemnity, no problem. If they were, again, forget the litigation, if they wanted to include a standard indemnity in their take-back paper, I think that's pretty standard.

But what they're doing here, I think, you have to agree with me, but I think they are taking a disallowed claim, they are purposefully not treating it under the plan because they know they have a problem that'll it be disallowed, and they are essentially laundering it through the exit financing to get it to come out the other side, and I don't think you can do that.

THE COURT: So let me -- I really want to understand this because I've thought about this a bunch. My guess is if I really pressed Mr. Schrock, he'd stand up and -- or the lenders, they'd stand up and say, we agree that that pre-petition indemnity claim is disallowed, withdrawn, whatever, they'll stand up and say that. I would. And what they're

going to say is, is that we are giving a basket of consideration to make this company work and part of the give and the take is we want a replacement insurance policy for what we lost.

That's what I'm really focused on. I mean, I don't know what they're going to say, but I know what argument I would make. And then I'm really curious why you draw a distinction between our -- I have friends at AIG, I'm sure I'm going to get a hate email by the time this gets around, but, you know, why it is that you draw a distinction between I can go buy an AIG policy and give it to them, but I can't give them an indemnity, which is really just an insurance policy from a different insurer.

MR. HERMANN: Well, I guess in that circumstance AIG would write a policy, the company would pay for it. Okay. AIG would probably cost the company a fair amount of money to go get that policy. And then the lenders could look to that policy, I agree with you, and then AIG could look to indemnity against the company, there's no issue there. Right? My own view is that the distinction is that they are taking a claim that should be -- has to be disallowed --

THE COURT: Right.

MR. HERMANN: -- and they are sticking -- letting it go through, and I think that's a problem.

THE COURT: So when Mr. Greenberg stands up and

says, we agree the claim's disallowed, what does that do to your argument? I mean you're not going to call him a liar, I don't think.

MR. HERMANN: Well, then I think it has to come out of the exit financing.

THE COURT: Well, you're going to say that it's a different indemnity, it's a different insurance policy. It's what you said, I can go buy one, I can go get one from someone else, but you're just saying the Debtor can't make it. And I'm trying to understand why you draw that distinction and why can't the Debtor?

MR. HERMANN: If you accept -- here's what I would say to that --

THE COURT: Okay.

MR. HERMANN: -- if you accept that it's a completely different indemnity, then there is no distinction between that and the AIG policy.

THE COURT: Okay. You're just telling me I can't get there, and you're telling me that his words of saying, we agree that the pre-petition indemnity is disallowed?

MR. HERMANN: Right. Because, again --

THE COURT: You want to hear them say it? I mean, I bet I can -- I think I can push him into it.

MR. HERMANN: But there's a history here, Your Honor, that I don't think can be ignored.

THE COURT: Right.

MR. HERMANN: Right. Because they knew -- the whole goal here -- the indemnity sits at the top of the capital structure. Okay. So if you wanted to do this right, you would have treated it. But they didn't want to treat it because they didn't want -- the lenders who were parties in 2020 no longer held the debt to walk away with the consideration that's going to the lenders that continue to hold the debt.

THE COURT: Right. So watch this.

So, Mr. Greenberg, assuming that the plan is approved, do you agree that any pre-petition indemnity claim that your clients held is disallowed?

MR. GREENBERG: Your Honor, Scott Greenberg, Gibson Dunn & Crutcher, for the Record. I think we're thinking about it exactly the same way. We had pre-petition indemnity claims, which I think is what Mr. Hermann's --

THE COURT: Right.

MR. GREENBERG: -- focused on, and those will get deal with in the plan.

THE COURT: But you didn't answer the question.

MR. GREENBERG: Right. I haven't answered the question. And, yes, and then there's a new indemnity that is part of the consideration as I talked about in my opening remarks as part of the overall plan settlement that our

clients have been negotiating with Mr. Schrock and the Debtors since the fall of this year.

THE COURT: Got it.

Mr. Schrock?

MR. SCHROCK: Yeah, Judge, the pre-petition indemnity will be disallowed. It's a new indemnity, that's why we have the provision in 8.5(b) granting new indemnity as part of the overall settlement. We could certainly do that. There's nothing that prohibits the Debtor from, as part of the basket of consideration, giving a new indemnity. That's the condition that's necessary to get this done.

Mr. Hermann has, you know, been doing an admiral job trying to get the lenders carved out and just go against the lenders. This is just another extension of the argument.

THE COURT: No, I got all of that. I knew this was out there, and I knew this was coming, this is why I want to give you an opportunity to tell me how does that change your argument with respect to the indemnity?

MR. HERMANN: Again --

THE COURT: They've stood up and said it's gone.

MR. HERMANN: Yeah, well, again, I think that all they've done -- and, listen, it's creative, but if you follow the bouncing ball, this indemnity has lived in the plan through an executory contact, then it lived somewhere else, now it's going to the exit financing, it's the same indemnity.

It’s just a slight of hand.

THE COURT: But it’s a slight of hand though -- I mean you have to deal with the argument now. If you -- and again, I’m not taking any of your arguments away from you, I’m genuinely trying to understand how -- the path you’re walking.

So now you have -- if you accept that the pre-petition indemnity is gone, now you have a huge exchange of value in return for that indemnity. And I’m struggling -- I think you agree and I think it’s right that I can exchange value and buy a third-party insurance policy. Why can’t I take the exchange of value and then realize the premium that would otherwise be the insurer’s profit, and if they’re willing to take it, give them the same -- give them the same promise.

MR. HERMANN: My response to that, Your Honor, is that if it’s a new indemnity and you’re not buying my argument about it’s the same indemnity traveling along the way --

THE COURT: I’m not saying I’m not, Mr. Hermann, I’ve got it.

MR. HERMANN: And I think you’re --

THE COURT: It’s showed up in a number of places.

MR. HERMANN: -- I think you’re absolutely right.

THE COURT: Okay. Then I got it that it’s reared its head in a number of different places, and you objected to it, I commented on it, and Debtors have reacted along the way,

and the lenders have reacted along the way. I just want to make sure I understand the argument and I always appreciate what you have to say. I want to understand, because I knew this argument was out there. You can read between the lines and see it. And I just wanted to make sure that you had an opportunity to respond to that.

MR. HERMANN: Okay. I'll move on to the absolute priority rule.

THE COURT: Okay.

MR. HERMANN: So I think we can maybe cut to the chase on this. As I understood the Plan and Disclosure Statement based on the words that are in it, putting aside all the complexity, the 6-step transaction and all of that, it's a million and a half dollars going to existing equity on account of, or "in respect of" I think is the exact words they use, their existing equity. That's an absolute priority violation, clear as day. Now when I read their papers they say, no, no, no, it's really not on account of their existing equity, it's on account of other stuff --

THE COURT: Yeah.

MR. HERMANN: -- that's new value. And what I would say to that is, fine, if it is on account of new value, and that's clear in the conclusions and findings, you find that that new value is sufficient to justify the million and a half dollar payment, we don't have an objection. But if it on

account of existing equity, then I think that's an absolute priority problem.

THE COURT: Right. So the argument is, is that the -- in my head I remember $54 million of tax benefits. And that's what they're saying the exchange is. And you're telling me you just don't think that's -- given all -- and I got it, the supplements are changing and things are moving, but do you think the documents as they exist right now don't say that?

MR. HERMANN: No, I think that -- my own view is that the evidence came in that there is a $54 million tax refund that is out there that they can go get --

THE COURT: Right.

MR. HERMANN: -- if they do the steps transaction. However, to do it as I read their Disclosure Statement, we can look at the words together because it's in two different places --

THE COURT: Right.

MR. HERMANN: -- they say that they have to pay a million and a half dollars on account of -- or in respect of existing equity. I'm cutting through a bunch of defined terms, but that's essentially what it says.

THE COURT: Sure.

MR. HERMANN: And so my view is, I'm not questioning the trade, you obviously need to make the finding that it's

fair, it seems fair, a million and a half for $54 million, but if --

THE COURT: Well, it's a million and a half in exchange for a shot.

MR. HERMANN: A shot at 54. Correct. It seems like a fair trade. However, if they're -- so if they're getting the million and a half on account of new value, we have no issue. I think that that should just be made clear and the Record should be cleaned up because the Disclosure Statement says it's on account of their existing equity. If it's not on account of their existing equity, then I don't think we have an absolute priority problem. If it is, then I think the plan has an absolute priority issue.

THE COURT: Mr. Schrock, did you --

MR. SCHROCK: Yes, Your Honor. Sorry, Brian, first rising. We can certainly -- to the extent there's any ambiguity, it certainly is on account of new value. That'll be clear in the findings of fact and conclusions of law. It's not account of, you know, their equity distribution. I thought we made that clear, but to the extent there's any ambiguity, we want to be clear.

MR. HERMANN: That's fine.

THE COURT: Okay.

MR. HERMANN: My last issue, Your Honor, is one that you're going to tell me I don't need to worry about, which

makes me happy, is they have a request to waive the 14-day stay for the plan to go effective. We are not looking to interfere with whenever they want to go effective, assuming that the plan gets confirmed and our objections are overruled, but we don't want to be -- we don't want to have an argument made that because we either didn't move for a stay or didn't oppose the 3020 relief that they were requesting, that somehow we are in some equitable mootness trap.

THE COURT: Right.

MR. HERMANN: And so if they want to go effective by a certain date, and we have to be given the ability to move for a stay, you know, we have no problem with that. If -- I know you don't like oral motions for a stay, we could always proceed that way to expedite, or if they want to just agree that, you know, they're not going to use that against us, you know, as a basis for -- for an equitable mootness argument, I'm sure we could work through that. But we cannot be left in a situation where we can't -- don't have the opportunity to move for a stay and then get penalized for it.

THE COURT: I totally got that. And when I get done with the argument we need to talk about timing, because this is not something I'm going to rule from the bench on. I know normally I do, but this is something I know it's going up either way, I need to be -- you know, I told you last time with respect to the adversary I was really trying not to

create a precedent, I was trying to give you all room to negotiate. You know, this time I have to.

And so I'm actually going to -- I'm actually going to put all of my thoughts down in writing and all of my reasons why. I know there's some dates that are running, I know that I had a vacation planned for the first time in 16 years for next week, and I know I'm not going now, which I'm actually kind of happy about, I was a little insecure about going on vacation.

(Laughter.)

THE COURT: So we need to talk about timing and whether it's in the form of a, you know, a stipulation that equitable mootness will not be asserted or whether it's a -- you know, we need to have a hearing, or whether or not you need a temporary stay so that you can go to the District Court, I mean we'll work through all of that once I understand what the timing issues are, but I got that.

MR. HERMANN: Great.

THE COURT: All right.

MR. HERMANN: Thank you, Your Honor.

THE COURT: All right. Thank you.

Let me ask, Mr. Millar. Good evening.

MR. MILLAR: Good evening. How are you?

THE COURT: Doing fine. Thank you for asking.

MR. MILLAR: I think -- I guess I'm last.

THE COURT: But certainly the most anticipated.

(Laughter.)

MR. MILLAR: I might miss my flight and I would need Mr. Seiler to re-book me if he could.

THE COURT: Well, I'm sure -- he's opening up his own travel booking service --

MR. MILLAR: Right.

THE COURT: -- so he'll get that done for you.

(Pause in the proceedings.)

MR. MILLAR: Your Honor --

THE COURT: So you never found a friend throughout the entire week.

MR. MILLAR: No.

(Laughter.)

MR. MILLAR: It's the story of my life I suppose.

Your Honor, for the Record, James Millar on behalf of Citadel Equity Fund Limited. And, Your Honor, first of all, I would like to thank the Court for its time and attention to this matter, and thank you for hearing us.

CLOSING ARGUMENTS

BY MR. MILLAR: Your Honor, this is a complicated set of issues, and as complicated as these issues are, I would like to start off with a simple observation that is core to how my client is approaching this case and the company.

That is that the indemnity obligations that the

reorganized Debtors are attempting to assume are not good for my client as a stakeholder --

THE COURT: Right.

MR. MILLAR: -- but that's because they're not good for Serta.

THE COURT: Could I ask you, just so I have a point of context?

MR. MILLAR: Yes.

THE COURT: Do you -- are you in the same position as Mr. Hermann that you don't have a problem with the indemnity just the 19 words, or you have a problem with the indemnity in its entirety.

MR. MILLAR: I have a problem with any indemnity that allows the favored holders to come back against the company. And I'm going to --

THE COURT: For anything.

MR. MILLAR: For anything. Because I'm in a different position, I am an FLSO holder.

THE COURT: I think that's why I was asking --

MR. MILLAR: Yeah. Right.

THE COURT: -- so thank you.

MR. MILLAR: So my fortunes are tied to the company, and I want to see the company succeed because that's, candidly, what is good for us.

THE COURT: So in one sort of view you're on the

wrong side of the room.

MR. MILLAR: I am.

THE COURT: Yeah.

MR. MILLAR: Exactly right. And I was going to get to it in my prepared remarks. But let me cut to the chase, Your Honor, and that is we feel we are aligned with the company, not with the Gibson Group, but we are aligned with the company, with their employees, with the customers, with the success of this company. That's where we sit. And I know Your Honor -- I don't want to go through the whole financing issue, but you know that we were prepared to invest more money, because that's how we feel about the company.

So, look, you're going to hear me in a couple of minutes go through some of the legal issues, but I don't want the basic economic point to be lost and that is, again, that we view the indemnity as bad. And in a case that is marked by disagreement over numerous issues, I don't think anybody in this courtroom views the indemnity -- I'm sorry, let me restate that, I don't think anybody thinks the company is better off with the indemnity, as opposed to without it.

THE COURT: Sure.

MR. MILLAR: You've heard testimony about that. That is straightforward. And that's really where we're coming from.

THE COURT: So what would the cap structure of the

Reorganized Debtor look like if there was a billion six worth of debt wherever you think it lies in the capital structure versus being converted to equity?

MR. MILLAR: Well, I don't think the Reorganized Debtor would have a billion six of debt. I think candidly the plan would look just like the plan does now without the indemnity. And I think the testimony that people say, I was going to get to this, let's cut to the chase, the testimony that people say, well, we wouldn't have taken that deal. Actually I think you would have.

THE COURT: So but let's assume -- let's assume for a second, because I tried to work my way through this, you actually think you could enforce that absent consent?

MR. MILLAR: You couldn't have forced it absent consent because we have a rule that says you can't convert debt into equity, secured debt --

THE COURT: Right.

MR. MILLAR: -- without their vote. But what they're telling you is something a little bit different. What they're telling you is essentially we wouldn't have taken a deal --

THE COURT: Well, yeah, I'm ignoring them for a second.

MR. MILLAR: Yeah.

THE COURT: I'm just trying to look like -- so, you

know, obviously the Debtor could have filed a 506 and I could bifurcate and figure out what the secured claim is, what the unsecured claim is, and, you know, who knows what they would end up voting, but the cap structure would look very different, wouldn't it?

MR. MILLAR: Look, I actually don't think so, and here's why.

THE COURT: Okay.

MR. MILLAR: Because they take the same deal without the indemnity, that's why.

THE COURT: Why don't I -- why don't I know that?

MR. MILLAR: I think you have to think about people as economically rational actors, and they got up here and sort of testified, and I don't think you should credit this testimony --

THE COURT: Right.

MR. MILLAR: -- that without the indemnity they wouldn't have done this deal. Well, what would they have done? Would they have let the company go into liquidation and driven their investment into zero?

THE COURT: Right.

MR. MILLAR: They wouldn't have done that.

THE COURT: So walk down the path with me. So let's assume that you convince me that you're all-knowing and right. And so I go --

MR. MILLAR: Do I have to do that?

THE COURT: Well, to go down this path you do.

MR. MILLAR: Because that's harder -- that seems like a real hard issue. But, yeah, I'm sorry, go ahead.

THE COURT: So I deny confirmation, you actually probably want me to grant the adversary, but I deny confirmation.

MR. MILLAR: When you say, I'm sorry, grant the adversary?

THE COURT: But you probably want me to grant the requested relief in the adversary given where you sit. But let's say I deny confirmation.

MR. MILLAR: Okay.

THE COURT: And the Debtors win the adversary.

MR. MILLAR: Okay.

THE COURT: What's next?

MR. MILLAR: Then I think, and in your hypothetical have we resolved the appeals? Probably not.

THE COURT: Oh, no, that's -- they're off --

MR. MILLAR: Yeah, then I --

THE COURT: -- appealing everything.

MR. MILLAR: -- think -- then I think the Debtors have to do what Debtors often do in Chapter 11 and that is face hard issues and a hard bargaining with their counterparties. And you go to the counterparty and you say,

you're not getting this indemnity.

THE COURT: Right.

MR. MILLAR: And so are we going to restructure without the indemnity so the company and your equity value can go up --

THE COURT: Right.

MR. MILLAR: -- or are you going to hold up this whole thing so that you, and you remember is a subset --

THE COURT: Right. So you think the Debtors just gave up, is that what You're telling me?

MR. MILLAR: I think that they -- I think that they got a bad deal --

THE COURT: Okay.

MR. MILLAR: -- I think it is -- you know, we can talk about it in terms of business judgment, I don't think they satisfied a business judgment test.

THE COURT: Okay.

MR. MILLAR: I don't think that they took advantage of their legal avenues to say, this claim is disallowable and you're not getting it.

Also, Your Honor, there's one other point, and that is remember this isn't the FLSO class, or even the FLFO class. This is a subset of parties represented, some by Greenberg, that is saying, we won't do this unless we get the indemnity. If the Debtors were on the ball, would they be saying to them,

pardon me, is that's (indiscernible). Okay. We can designate your vote on that.

And that's true, there is a 5th Circuit case -- now we're going down a rabbit hole, I was wondering which rabbit hole we were going to go down, but let's go down this one. Okay? There is a 5th Circuit case with Conrad Hill (phonetic) who did exactly this, and the 5th Circuit said, you can do it. And what happened? They amended the Bankruptcy Code to put in the vote designation provision.

THE COURT: Uh-huh.

MR. MILLAR: And so what they're saying is a subset of them, some of them sit in the FLSO class, some of them sit in the FLFO class, some of them, until they changed the indemnity last night or the night before, weren't even before this Court. And if that group is saying, we're not going to let this Debtor reorganize unless we get that indemnity, that's bad faith.

THE COURT: And so going down this path, how long does that take?

MR. MILLAR: About vote designation?

THE COURT: No, no, I've both asked for them and presided over them, your alternative plan.

MR. MILLAR: Well, look, my alternative plan, which I think and I mentioned this at my opening, could be confirmed today because the indemnity is not, until perhaps last night,

treatment of FLSO claims.

THE COURT: All right. So let's assume I disagreed with you --

MR. MILLAR: Okay.

THE COURT: -- and you've got to start from scratch.

MR. MILLAR: You know --

THE COURT: So, one, you've got to file your own motion. Right?

MR. MILLAR: Which motion is this?

THE COURT: To bring exclusivity to an end so that you can file your own plan.

MR. MILLAR: I'd like to think the Debtors would do it.

THE COURT: You'd like to think -- okay. So --

MR. MILLAR: I mean if this --

THE COURT: -- you're going to go get the Debtors to do it.

MR. MILLAR: But if they're doing their job, I think they should. Right? They don't need to team up with just one stakeholder at the risk of their own company.

THE COURT: Okay. So let's assume you're right.

MR. MILLAR: Okay.

THE COURT: We are six months out from doing this again?

MR. MILLAR: I don't think it needs to be that long. I mean maybe, maybe it's three. There is a delay, Your Honor, I'm not going to -- I'm not going to tell you --

THE COURT: I'm actually being genuine in my question because --

MR. MILLAR: Yeah.

THE COURT: -- you've got, you know, 28 and 28, let's assume that everybody wants no shortcuts, so, you know, there's two months. It's going to take everybody -- you know, no one does anything quick anymore, it's going to take 60, 90 days to get something drafted, circulated, people are going to fight. You know, I mediated a certain case and gave them, you know, three months ago and all they had to do was just take my term sheet and write a plan. They're still fighting over it.

MR. MILLAR: I understand.

THE COURT: I mean I'm --

MR. MILLAR: Well --

THE COURT: -- not complaining, just trying to be realistic.

MR. MILLAR: Sure, there would be delay.

THE COURT: That has a huge cost.

MR. MILLAR: It has a cost, but the answer to that is not to put through a bad plan that has legal infirmities. That would be my answer. I'm not telling you that delay

doesn't have cost. And indeed it would be cost to the business, it would be fees, it would be candidly the Court's time, it would be a lot of things.

THE COURT: But time is negligible. I can -- I look at the W-2 at the end of every year, it's negligible.

(Laughter.)

MR. MILLAR: Touché, Your Honor.

So I don't -- I'm not here to tell you that that wouldn't be a cost.

THE COURT: Okay.

MR. MILLAR: All right. But it is -- it is --

THE COURT: You think it's worth it.

MR. MILLAR: I do.

THE COURT: Okay.

MR. MILLAR: Because let's -- what's the alternative? Let's say this plan is confirmed. You say, you know, Mr. Millar, no, on everything and this plan is confirmed, and the 5th Circuit reverses.

THE COURT: Well, reverses what?

MR. MILLAR: The issue that's pending there now.

THE COURT: Well, that's an interesting question. So I confirm the plan, and the Circuit says, Jones, you should have given us findings and conclusions, which is a likely outcome, given what I did. So that comes back to me for findings and conclusions, or maybe they decide that I'm not

smart enough to actually do that and they do that themselves. What does that do to confirmation?

MR. MILLAR: Well, if you've confirmed the plan, and the plan has gone effective --

THE COURT: What's -- what are the conditions to going effective?

MR. MILLAR: I don't believe that there would be any condition that would prevent them from going effective before the 5th Circuit resolves that issue. So they can -- what I'm saying is they can go effective if you confirm the plan as I understand it within a matter of days or weeks.

THE COURT: Right.

MR. MILLAR: Right. The 5th Circuit is six months out. So I've always assumed the plan is going to be effective.

THE COURT: Right.

MR. MILLAR: And then you're going to have a --

THE COURT: Then where are we?

MR. MILLAR: Then I think we're in a really bad spot candidly because then you're going to have --

THE COURT: So we've got a Reorganized Debtor with a good cap structure, but a potentially horrific indemnity claim.

\- MR. MILLAR: Correct.

THE COURT: All right. And then -- and more

litigation.

MR. MILLAR: And more litigation. And by the way, who's actually going to be in control of the Debtor then when the parties that get the equity trade out and then they're just going to be like enforcing their indemnity against a company that they might not have any stake in?

THE COURT: Yeah, that was the polite strategy call that we heard about earlier that we don't know what would happen because, you know, that'll be just an economic strategy. Right?

MR. MILLAR: Sure.

THE COURT: Yeah.

MR. MILLAR: So where were we?

THE COURT: You were telling me why I shouldn't do this.

MR. MILLAR: Yeah, and so, Your Honor, I think that -- and Your Honor said it when you and I first met, that it could be another restructuring, it could be something worse.

THE COURT: Right.

MR. MILLAR: Chapter 22s have sort of bad -- you know, they don't always work out as well as the first one did. You know that, you know that better than anyone.

THE COURT: Right.

MR. MILLAR: And we're taking that risk, and we

don't need to is my point. There has to be another solution. There has to be a way to eliminate the indemnity from this company going forward. And I'm going to talk to you about legal theories, but at the end of the day that's where we're trying to get to, is this company, it's in a Chapter 11 now, and it's spending time here, it's taking -- there's a hit on the business, it's taking that now, it's paying for people --

THE COURT: So --

MR. MILLAR: -- we should deal with this now.

THE COURT: -- so let me come back to my insurance --

MR. MILLAR: Yes.

THE COURT: -- question that I talked to Mr. Hermann about.

If the Debtors went out and spent -- and I have no idea of what a policy -- well, you can insure anything, it's just a matter of cost. Right? So I have no idea what a policy, an indemnity -- a policy that would provide a similar indemnity like this would cost, but, you know, let's assume that it's $50 million.

Would you be okay with the Debtor spending $50 million to go buy a policy --

MR. MILLAR: No.

THE COURT: -- if everything else stayed the same? Why not?

MR. MILLAR: No, I'm going to disagree with my friend, Mr. Hermann.

THE COURT: Okay. Why not?

MR. MILLAR: Because that is in substance the same thing as allowing this indemnity to ride through, and there's a --

THE COURT: How so?

MR. MILLAR: -- there's a case on it.

THE COURT: No, but talk to me about economics because I assume at the end of the day I mean you said economic actor, I assume your clients won. So be an economic actor --

MR. MILLAR: Okay.

THE COURT: -- number one, you're getting certainty at a, you know, at a price, you factor that into your model and what the value of the equity and everything else is, why wouldn't you do that?

MR. MILLAR: Because you're doing what Congress has prescribed and said you can't do.

THE COURT: No, I want to talk about just economics.

MR. MILLAR: Then they can -- well --

THE COURT: If you could cut all this off --

MR. MILLAR: Yeah.

THE COURT: -- you could get the certainty of confirmation and a restructured Debtor, and you could limit

your exposure for whatever it is you want to call that for a sum certain, and let's assume that it's affordable --

MR. MILLAR: Well, okay, therein lies problem number one, is it affordable?

THE COURT: Yeah, but you told me -- you didn't even go to price, you just said, absolutely not, and I'm trying to figure out why you told me that.

MR. MILLAR: But -- because I want to make the legal point, not the economic point.

THE COURT: Okay.

MR. MILLAR: The legal point is if you are trying to take a -- I was about to say a duck and I guess I'm going to go there -- if it looks like a duck and it quacks like a duck, it's a duck. Okay. And the case I was going to point you to was District Judge Sullivan in *Leeman* where what they tried to do in that plan was put in administrative expenses, and they said, in this plan we're going to pay, and they gave it like a different name, administrative something or other, on behalf of the individuals' counsel on the Committee. So, you know, the Committee had whatever, 15 people and --

THE COURT: Okay. So they said they were going to pay --

MR. MILLAR: They were going to pay those --

THE COURT: -- individual counsel.

MR. MILLAR: Yeah, it was in the plan and the US

Trustee objected, the plan got confirmed, that issue was carved out, it went up to Judge Sullivan, he said, no, you can't do that. Okay? I know you're not actually doing it under Section 503(b) of the Bankruptcy Code, but that's really what you're doing. And when the Bankruptcy Code says you can't do this, and then you re-name it and do it in a different way, you can't do that.

And here when they go out and they buy that insurance policy, they're -- that's -- they are then realizing double -- I was about to say double counting, but it is what Congress has prescribed in 502(e)(1)(B) which is I'm going to have this allowed claim on the debt and I'm going to have this allowed claim on the indemnity. That's what they're doing.

THE COURT: Okay. So let me ask you this: What is the value of equitizing in this Debtor a billion six worth of debt?

MR. MILLAR: That's a good question. I can't value that. It --

THE COURT: Somebody can.

MR. MILLAR: Somebody can and maybe somebody could come up here and put a number on it.

THE COURT: Can we agree that it's a lot?

MR. MILLAR: I would say that when they get 99 percent of the equity and all the new debt, they have been paid more than handsomely for that. They don't need the

indemnity, too.

THE COURT: But I'm going in a totally different direction.

MR. MILLAR: Okay.

THE COURT: So what's the value of agreeing to equitize a billion six worth of debt to this company? Is it significant?

MR. MILLAR: Equitized debt is significant, sure.

THE COURT: Okay. And so there's a give of something significant, and what they're asking for back is something significant.

MR. MILLAR: The currency that they can't have.

THE COURT: The currency -- that's the first time anybody's told me that.

MR. MILLAR: Yeah.

THE COURT: You say it's a currency they can't have.

MR. MILLAR: Yeah, if you follow the *Leeman* case with a little different -- not on all fours, but they can't have the indemnity.

THE COURT: Okay.

MR. MILLAR: They can't, they can't have the indemnity as they originally drafted the plan --

THE COURT: Right.

MR. MILLAR: -- where it was assumed, and they can't call it something different and get the same thing.

They can't have that.

THE COURT: Right. I agree --

MR. MILLAR: If they want a Labradoodle --

THE COURT: Yeah.

MR. MILLAR: -- they can all have Labradoodles. But they can't have an indemnity.

THE COURT: Okay. That's the first time anybody's told me that. So it's -- and it makes -- it's something I can -- that I can put my hands around. You're just saying they can't deal in this currency.

MR. MILLAR: Correct.

THE COURT: Okay.

MR. MILLAR: That's right.

So, Your Honor, I'm not sure if we are at the point where they have stipulated that their 502(e)(1)(B) claim is disallowed, but I do want to return to where we are in this case.

And if I may, Your Honor -- I can't see --

THE COURT: No, I got it, I am, too.

MR. MILLAR: -- then I can't see you.

THE COURT: I have the same problem which is why I take them off.

MR. MILLAR: So, Your Honor, on the 502(e)(1)(B) point I just want to make this clear as to how we're walking through the argument. There is an issue as to whether the

501 -- 502(e)(1)(B) disallows the indemnity claim, but further to what we were just talking about, how is that relevant to this plan? And here's -- this is built on or is consistent with what Mr. Hermann was saying.

THE COURT: Okay.

MR. MILLAR: Since the claim should be disallowed under 502(e)(1)(B), the indemnity cannot survive as a liability of the Reorganized Debtor. That's the point we just -- we just talked about.

THE COURT: Right.

MR. MILLAR: And, Your Honor, I wanted to just highlight the law on the sort of ride-through point. And that is that Federal Bankruptcy Rule 3021 states that distribution --

THE COURT: 302 what?

MR. MILLAR: 3021.

THE COURT: 3021, I got it.

MR. MILLAR: I'm sorry.

THE COURT: There's a 3002.1 which is why I was confused.

MR. MILLAR: Oh, yeah, very different.

You can't make distributions to creditors who -- I'm sorry, I was reading something different.

Distributions shall only be made to creditors whose claims have been allowed. And as we cite in our brief, the

Diruzzo case, 527 BR 800, disallowed claims will not participate in the case or receive any payment with regard to that claim.

So if we're talking in this case about a claim that we believe to be disallowed, which is -- I enjoyed your hypotheticals but this case is very clear that we're talking about the pre-petition indemnity, they can't get that because that claim should be disallowed.

And the other Code section that I would like to point to Your Honor, Mr. Hermann properly mentioned 1129(a)(1), I'm going to mention 1123(b)(6) because Your Honor the other day in speaking about the settlement talked about 1123(b)(3) which speaks to settlements.

But 1123(b)(6) informs all of those other items 1123(b)(1) through (b)(5), and what it says is a plan may include any other appropriate provision not inconsistent with the applicable provisions of this title.

Again, that informs how one reads 1123(b)(3) regarding, you know, can you have a settlement in a plan. You can have a settlement in a plan, but it can't do something that is inconsistent with the bankruptcy laws. And paying a disallowed claim clearly is.

Now we would be having maybe a little bit of a different conversation if they truly did buy an insurance policy. But that's not what they did here. The first thing

they did up until the eve of confirmation is they said they were assuming an indemnity claim. Mr. Hermann made that point.

THE COURT: Right.

MR. MILLAR: But if you look at their plan, Section 8.5, it's entitled, "Survival of the Debtors' indemnification obligations." To suggest that this isn't the pre-petition indemnity riding through just blanks reality. That's the title of that section. And indeed, 8.5B, and I quote, says the indemnity is, quote, "On the same terms and limitations as afforded under the PTL credit agreement". They're making no bones about it, it is the pre-petition indemnity riding through.

Your Honor, if I may, I want to touch on a few other confirmation points.

THE COURT: Sure.

MR. MILLAR: I think Mr. Hermann has covered the actual co-liability element very well, and I won't belabor that, but I will say this, okay, the Debtors owe the non-PTL Lenders on the notes, there's no dispute about that. And if the 5th Circuit sides with the Excluded Lenders, the favored lenders are therefore required to pay the Excluded Lenders.

And here's the kicker, any amount that the favored lenders pay to the Excluded Lenders will reduce the amount of the Excluded Lenders' claim against the Debtor. That is the

essence of co-liability. When they get paid a dollar from -- if they win, their claim against the Debtor goes down and that's how the credit agreement works.

THE COURT: Right. Can you -- it just took me a while to get the current version of the plan up, you cited me a section --

MR. MILLAR: Oh --

THE COURT: -- with the title.

MR. MILLAR: 8.5, I believe it's entitled "Survival of the Debtor's indemnification."

THE COURT: I just wanted -- I just wanted to read it again in light of everything.

MR. MILLAR: Yeah. Okay. Shall I pause?

THE COURT: If you don't mind.

(Pause in the proceedings.)

THE COURT: Okay. Got it. Thank you.

MR. MILLAR: Okay. Thank you.

All right. So I made the co-liability point. Let me touch on, if I may, Your Honor, the 9019 settlement.

THE COURT: All right.

MR. MILLAR: As Your Honor knows for a court to approve a settlement under 9019 it has to be fair and equitable, in the best interest of the estate, the Debtors have to exercise their business judgment. And here they have failed to meet that burden for at least two reasons. First

is, Your Honor, there is no actual evidence that the Debtors ever valued the indemnity, or as Mr. Hermann pointed out even included it in the term sheet when they entered into the Restructuring Support Agreement.

And that testimony is abundantly clear from Mr. Tepner, Mr. Shah and Mr. Linker, they just didn't value it. And if it was such an integral part of that settlement, Your Honor, how is it that the settlement keeps changing day-to-day? Literally in the last 48 hours that settlement changed from indemnifying the so-called PTL Lenders to now just indemnifying people who hold the debt on the effective date. I don't know who those people are, I don't know if anybody can know who those people are, but if this is such a heavily negotiated term, why is it changing literally day-by-day?

And further to that, Your Honor, how could the -- granting this indemnity that could cripple the company ever be viewed as in the best interest of the estate? Mr. Tepner never testified -- I'm sorry, he -- pardon me, he testified that they never offered the exact same deal without the indemnity. And this goes to my previous point, what exactly would have happened if they had done this deal without the indemnity?

You shouldn't -- my suggestion, my argument is you shouldn't credit the testimony that says they would have

driven the company into liquidation or some other sort of bad things.

And, Your Honor, I want to make one other point about the indemnity as re-cut as of 48 hours ago.

THE COURT: Okay.

MR. MILLAR: So now they say anybody who owns the FLSO debt and the FLFO debt, so Class 3 and 4, as of the effective date, yet to happen, gets the indemnity. Okay. So speaking of selling insurance, apparently anybody can go out today or tomorrow when the market's open and buy this debt --

THE COURT: Right.

MR. MILLAR: -- and get an indemnity from the Debtor. How -- what is that person giving in this so-called intricate settlement?

THE COURT: Yeah, but what are they getting? They're getting indemnity for a transaction that they didn't participate in.

MR. MILLAR: Unless you are an institution that did participate in it --

THE COURT: I guess there could be --

MR. MILLAR: -- and sold out.

THE COURT: -- someone who's really brilliant and is going to make that circle. I got it.

MR. MILLAR: But understand the other point is, the amount of debt you hold -- let's look at it a little

differently.

THE COURT: Sure.

MR. MILLAR: Let's say I want to -- I'm one of the institutions that's been sued by the Paul Weiss group, and I want to sell 99 percent of my debt. As long as I keep a dollar I still get that indemnity. How is that a settlement when I've sold out of the debt? It doesn't -- it's not -- the economics aren't rationally related to each other. It's just if you hold the debt --

THE COURT: Right.

MR. MILLAR: -- you get the indemnity. That's ludicrous.

A few other points. You asked about economic duress and --

THE COURT: I think I said coercion, didn't I?

MR. MILLAR: It may be economic duress and coercion, but it's getting late and I'm just going to call it economic duress.

THE COURT: Okay.

MR. MILLAR: If the Court were to view the Debtors' choice as rational, and we don't think you should, then given the circumstances it clearly was a product of economic duress. Let's look at the definition. And I have a case here, *Mandel v Liebman*, it's in our paper, 303 NY 8894, 1951. It's really old, you know it's good law.

(Laughter.)

MR. MILLAR: Those are the best cases. Right?

And the quote from that case is, you know, "The inequality of consideration is so strong and manifest as to shock the conscience and confound the judgment of any man of common sense". Okay?

And giving up everything, all the debt, all the equity, what could be a billions dollars of indemnity liability, that to your -- you asked about -- I think that's economic distress. We think it's not good faith -- pardon me, not exercise of business judgment, but it is -- if you were to say, well, it was business judgment, then they were under severe economic distress.

THE COURT: Okay. All right. Thank you.

MR. MILLAR: Let me turn to feasibility.

THE COURT: Oh, I'm sorry. Yes, sir.

MR. MILLAR: This is one of my favorite issues.

THE COURT: Got it. All right.

MR. MILLAR: Because we've seen slides, I don't have any slides, and we've seen case cites. There is a Circuit level decision on all fours. It's out of the 9th Circuit, but I would like to briefly talk about that case.

THE COURT: All right.

MR. MILLAR: It is *In Re Harbin*. Okay. So what happened in *Harbin*, and it is 486 F.3d 510, 9th Circuit, 2007,

relatively recently.

THE COURT: Right.

MR. MILLAR: So in that case, Your Honor, Harbin was an individual Debtor. He also had a company, he was a lawyer in fact. But his company and he both went into bankruptcy. We're focused on the individual's bankruptcy case. And he had been sued by Sherman. And during Harbin's bankruptcy case, the suit was in State Court, Sherman -- the State Court ruled in favor of the Debtor, Harbin, and said, Sherman, no, no personal liability on behalf of Harbin.

(Electronic voice interruption.)

THE COURT: Sorry about that.

MR. MILLAR: Okay. So Sherman, the creditor, loses, and he appeals and he gets relief from stay, he's proceeding in State Court so it's not in front of the Bankruptcy judge, but it's -- he's appealing, he's lost.

THE COURT: Right.

MR. MILLAR: And Harbin goes to confirm his Chapter 11 case because he converted to a Chapter 11. And Sherman makes a claim. And that -- Harbin objects to the claim, the claim is disallowed --

THE COURT: Sure.

MR. MILLAR: -- with the ability to re-file it, but it's disallowed. While Sherman's appeal was pending, Harbin goes to confirmation, said, I want to confirm my plan, we'll

waiting for the Appellate Courts, and Sherman objects on feasibility.

And this is his argument quoted from the 9th Circuit, "The plan did not reserve an allowance for Sherman's claim should he prevail on appeal. In such event Sherman argued, Harbin would not have sufficient assets to cover Sherman's claim and will be forced into further liquidation or reorganization."

THE COURT: Right.

MR. MILLAR: Precisely our situation. The 9th Circuit reversed.

THE COURT: That's where the concept of triggers came from.

MR. MILLAR: Triggers?

THE COURT: Uh-huh. You build them in.

MR. MILLAR: I'm sorry, I didn't --

THE COURT: Long story.

MR. MILLAR: Okay.

THE COURT: Not relevant. Sorry.

MR. MILLAR: But let me just say because this isn't like a case out of the Eastern District of New York, this is the Circuit, and this is the standard that we think should apply to this situation. When you have a matter on appeal where one -- where the Debtor won down below --

THE COURT: You're from New York, aren't you?

MR. MILLAR: No.

THE COURT: No, You're not?

MR. MILLAR: No.

THE COURT: Oh, I was going to say, you go make that statement and you're going to go home?

(Laughter.)

MR. MILLAR: Yeah, maybe not. No, I'm --

THE COURT: I'm having fun with you.

MR. MILLAR: -- I'm from the Midwest.

THE COURT: All right. Got it.

MR. MILLAR: A Bankruptcy Court, this is the whole thing, a Bankruptcy Court cannot adequately determine a plan's feasibility for the purposes of Section 1129(a)(11) without evaluating whether a potential future judgment may affect the Debtor's ability to implement its plan.

And, Your Honor, that was a reversal on a finding of fact. That was clear error.

THE COURT: Uh-huh.

MR. MILLAR: So that's precisely the issue here. It's literally on all fours. And so I would suggest to you that that's the right standard and we have a feasibility problem.

THE COURT: All right.

MR. MILLAR: Okay. 1123(a)(4) very briefly, Your Honor. You can't provide different treatment to claims in a

class. And here, they've given the indemnity and they say, oh, everybody gets the indemnity, we're not providing different treatment. But the indemnity only has value to certain of those claimants. They know that. There are claimants such as my client that have no interest whatsoever in that indemnity and don't want it. So you can't say that we're all getting the same thing when they're giving us -- purporting to give us something that has no value to us.

THE COURT: You're saying I look at value from the recipient not from the giver?

MR. MILLAR: Correct.

THE COURT: Okay.

MR. MILLAR: Very briefly, Your Honor, on re-solicitation. I have stood here before and said I don't think they need to re-solicit this plan. But I'll tell you what, if they -- they have said, oh, we do need to re-solicit the plan if you take out the indemnity. But now they're doing something entirely inconsistent with that statement. They are changing the indemnity, they are taking it away from certain people and they're saying they don't need to re-solicit. I actually agree with them that re-solicitation is not necessary. But it's not necessary, however, if you extract the indemnity in its entirety.

And finally, Your Honor, for the Record, we think that there have been some due process violations here by the

Debtors.

THE COURT: Okay.

MR. MILLAR: This indemnity was originally posited as an assumption of an executory contract. And then on the eve of confirmation they changed that and they've been in court saying, oh, it's a new indemnity. That's not the plan that they put forth.

THE COURT: Right.

MR. MILLAR: Okay. And if they want to put forth a plan that has a new indemnity and they want to perhaps value it or allow us to test that theory, they need to do that. They can't come in during confirmation and say, oh, it's totally different, it's a new indemnity, and now apparently stipulating that the original indemnity is disallowed. We think that is a lack of due process.

And on top of that just one final point. They have apparently changed it yet again, and now it covers different people. And I don't know who it covers, and if they really want that indemnity to be different, I think they have to actually follow the rules, which is 21 days' notice.

THE COURT: All right. Got it.

MR. MILLAR: With that, Your Honor, I think I've covered everything. Thank you so much.

THE COURT: All right. Thank you.

All right. Mr. Schrock?

CLOSING ARGUMENTS

BY MR. SCHROCK: Yeah. Well, Your Honor, Ray Schrock, Weil Gotshal Manges, for the Debtors. Let me just address a few points in addition to anything else you'd like me to hit. I know the hour is late.

First of all, regarding Mr. Hermann's comments about, you know, the confirmation order being stayed, and I appreciate what Your Honor said about if you were inclined to grant confirmation, we'd work out the timing.

Just for the Record, if they're going -- you know, the plan has always provided for a waiver --

THE COURT: Right.

MR. SCHROCK: -- of the, you know, of the standard 3020(e). If they have that objection, they should have made it, we would have briefed it, we'd deal with it. You can't just raise it, you know, at closing arguments, or at least the Court shouldn't allow them to do that.

I think that, you know, it's never been raised in the supplemental briefing, and to the extent that they have an issue I understand their issue is they want to go to court, I hear what he's saying is he doesn't want to fight confirmation, but he wants to be able to, you know, go to court. Based on what the Court said, I think that -- an appeal confirmation rather, I think that what I'm hearing is, you know, he wants to be able to do that. If he's going to do

that, we're not here today, and I heard what Your Honor said about equitable mootness, we're not here to waive any arguments on equitable mootness or otherwise, and we are very much aware of --

THE COURT: Sure.

MR. SCHROCK: -- of how Your Honor thinks about that.

THE COURT: But it's not how I think about it, it's how the Circuit thinks about it.

MR. SCHROCK: Duly noted.

THE COURT: There's a number of those cases. I was the lawyer that got overruled.

MR. SCHROCK: Yeah. Understood, Judge.

And I think that, you know, listen, if they're going -- you know, we need to get out of Chapter 11, the Record overwhelmingly supports that. I think that if the Court looks to Mr. Linker's testimony, you know, on May 17, and I'm looking at Pages 894 through 897, that, you know, Mr. Linker testified that if you're going to keep the company in bankruptcy, there's going to be significant adverse impacts to the company.

I heard Mr. Millar talk a lot about, well, you could just go out there and form a new plan and, you know, everything would be fine. We're not going to play brinkmanship with 3,000 jobs.

THE COURT: Right.

MR. SCHROCK: We have a deal.

THE COURT: So let me ask you this --

MR. SCHROCK: Sure.

THE COURT: -- and I'm -- I have all sorts of things I can do. I'm just --

MR. SCHROCK: Sure.

THE COURT: -- trying to figure out. Let's assume, and this won't -- this isn't going to happen so this -- it's why the example I'm going to use. Let's assume that I confirmed it tonight.

When do you intend on going effective?

MR. SCHROCK: Your Honor, I think that if you confirmed it tonight, one, we have to -- it's really just a matter of getting the closing and the exit financing done.

THE COURT: Uh-huh.

MR. SCHROCK: So we would -- if you entered an order tonight, we would do our very best to confirm -- or to go effective over the next several days.

THE COURT: Okay.

MR. SCHROCK: I can't tell you like definitively would it be -- it would certainly be several days.

THE COURT: All right. So let me -- just walk down this path with me.

MR. SCHROCK: Sure.

THE COURT: So Mr. Hermann being the good lawyer that he is said, I'd make an oral motion for stay because he knows he has to present it to me before he can go upstairs. I don't take oral motions for stay.

MR. SCHROCK: We would brief.

THE COURT: And I also set them along with a bond hearing --

MR. SCHROCK: Yes, of course.

THE COURT: -- we're going to have -- we're going to have a stay hearing and a bond hearing.

MR. SCHROCK: Right.

THE COURT: But if he chooses to go down that path, I'm going to give him that option. I mean I --

MR. SCHROCK: Understood.

THE COURT: -- just think he deserves that. And he deserves to have a shot at somebody saying, you know, Jones, you didn't do this the right way, you know, so I'm going to stay it until I can sort it out. And I'm just trying to -- I'm just trying to factor that into the thought process because since I have you here and --

MR. SCHROCK: Yes.

THE COURT: -- go back and visit anything else you wanted to talk about, remind me of your timing issues.

MR. SCHROCK: I believe it's under the RSA, it's June 6 --

THE COURT: That's what I had in my head.

MR. SCHROCK: -- presently. Yeah, and, Your Honor it's an RSA milestone. I think from the company's perspective we want to go as quickly as possible --

THE COURT: Of course.

MR. SCHROCK: -- and I would say, you know, Mr. Hermann, if he's worried about not being timely, you know, Paul Weiss is a large sophisticated firm, we could start working on the papers now. And we'll certainly do the same and we can have it heard promptly.

But if we are to go down this hypothetical that you're posing, Your Honor, I think that if you were to enter the order some time in the near future, we understand that -- we would just ask that if we're going to have that hearing, that everybody be prepared to do it right away so that we don't have a delay for emergence after issuance of the order, because we're certainly going to be -- you know, I intend on, you know, trying to emerge as quickly as possible.

THE COURT: I got it. So I mean, and I wasn't joking, I really cancelled next week, so I'm --

MR. SCHROCK: I'm sorry to hear that, Judge.

THE COURT: No, no, it's just what it is.

MR. SCHROCK: Yeah, I've been there.

THE COURT: So I'm going to work on this.

MR. SCHROCK: Yes.

THE COURT: You know, whether or not I can get it done in, you know, three or four days, I don't know --

MR. SCHROCK: Right.

THE COURT: -- we'll just have to see.

MR. SCHROCK: Right.

THE COURT: I have a lot to think about, I have a lot of -- you know, I've been re-reading, now that all the transcripts are up, I've been re-reading the transcripts. Now I've got a lot to go through and --

MR. SCHROCK: Yes.

THE COURT: -- I have to work my way through. And, but I do want to -- if Mr. Hermann, again, I mean, I just don't believe in oral motions for stay. I mean, I --

MR. SCHROCK: Right.

THE COURT: -- I think that if someone wants a stay --

MR. SCHROCK: Yeah, but we would say there's has to be stay, there has to be a bond.

THE COURT: Well, there does have to be a bond. You know, what that is is based on the evidence that I hear. The only reason I'm telling you this is I was just raised in the civil courts. I mean I --

MR. SCHROCK: Understood.

THE COURT: -- had those hearings after every time I lost. So and we're, you know, we're going to go through the

process because I give meaning to the process.

MR. SCHROCK: Understood.

THE COURT: Then I will -- you know, I would -- you know, Mr. Hermann, you know, you can draft this motion and be ready to go. All I can tell you is I'm going to give you the opportunity to do it because you've told me that you want that opportunity. So I'm going to give you the opportunity to file it. I'm going to have to see how -- just how my writing goes and --

MR. SCHROCK: Sure.

THE COURT: -- how quickly I can get this done.

In terms of what you're expecting, my thought was, is that one opinion, two orders. You have thoughts about that?

MR. SCHROCK: I think that certainly having -- I'm not sure if you need two orders, Judge. I think that we're -- you know, we certainly agree with one opinion. We think that -- as you know, we think they're all --

THE COURT: Well, the orders, you know how I do things, my orders are one page.

MR. SCHROCK: Understood. Yeah, I understand. I do think one opinion makes sense, and I'll have -- you know, others they can stand up and weigh in on that.

THE COURT: But I just think because there may be, you know, the appeal in the adversary, I mean, one, you want

to -- I would assume you're going to take that and get that consolidated at the Circuit together. I mean I can't imagine that you're asking the Circuit to weigh in on part when you appeal another part and it's down in the District Court.

And I certainly want you -- I certainly want everybody to make sure you tell those folks that that exists. But I can't imagine that they want to deal with that. So that's why I was thinking two orders so you can get that straight up to the 5th. I don't know if the 5th would take, you know, a confirmation appeal on a direct appeal, and even if they did, it would be a separate number. So that's why I was thinking two separate orders.

But if people -- I mean we have an appellate specialist who could probably tell me exactly --

(Laughter.)

THE COURT: -- criticized me many times before. I mean, Mr. Costa, again, I'm looking for assistance. I would think that --

MR. COSTA: I think it's cleaner to have two separate --

MR. SCHROCK: Yeah.

MR. COSTA: -- rulings if --

MR. SCHROCK: The only --

MR. COSTA: -- especially if they're going to follow a separate appellate path.

THE COURT: Right.

MR. SCHROCK: The only thing I would say about that, Judge --

THE COURT: Sure.

MR. SCHROCK: -- is we've always viewed that these issues around the adversary, they're fundamentally about claims against the Debtor and so they're intertwined into the confirmation order.

THE COURT: Tell me --

MR. SCHROCK: That's the way I always thought, you know, and listen, there was a lot of debate do we even need, you know, declaratory judgment actually because we're really taking about how are the claims against the Debtors --

THE COURT: I totally agree, which is why I went one opinion, two orders, because I don't do a whole lot in my orders. I know I sign orders all the time that are 50 or 60 pages long, but they're not mine, they're ones that, you know, that people give me that are agreed to.

MR. SCHROCK: Yeah, because my position would be, for the Debtors, is listen, if you're appealing this portion of the case, it's all an appeal of the confirmation order effectively. You can't just appeal part -- it's one record.

THE COURT: I'm happy to put it all into one and let you go deal with it. I was trying to be helpful.

MR. SCHROCK: Understood. Well, we could certainly

address it. I appreciate you saying that.

I did want to hit that, of course we do have a standard provision on Page 18 of our plan that says the headings in the plan are for convenience of reference only and are not otherwise substantive. We did not want to move the entire provision --

THE COURT: I didn't take anything by that, by that --

MR. SCHROCK: And I will tell you, Judge, I really take umbrage with the fact that a Debtor can't -- as consideration for disallowing the claim, so we're not doing anything under 1123 that's inconsistent --

THE COURT: Right.

MR. SCHROCK: -- with the Bankruptcy Code. But everybody knows, and listen, if we would have cut the deal with Mr. Hermann's client, he would have insisted on an indemnity which is just, you know, what I find so ironic about this particular argument, but we can certainly give consideration in the form of an indemnity.

That term loan has been on file with that indemnity by the way since April 21. Okay. So Mr. Millar is saying he didn't know about it. When we modified the indemnity we tailored --

THE COURT: You've got to listen to him, he's really tricky. He didn't say he didn't know about it, he said

someone out there might not know about it.

MR. SCHROCK: Right. Right. No, he wants us to throw out the deal and not re-solicit votes, but, you know, we're under -- this particular deal, we have to go re-solicit everything and throw out the entire plan and throw the company into peril.

I think that we want the ability to make sure that we can give this consideration which is clearly part of an unrefuted record around this particular topic. We don't think there's anything inconsistent in the law about it. I've got a lot of parties here that say they want the company to have a fresh start, but every single person's going to appeal confirmation to make sure that we don't.

And, Your Honor, this company, we need to move forward. And if Your Honor would be -- I would just ask that if Your -- I understand you're not going to enter an order tonight, but if you -- I'm taking your -- what you're saying, if you're inclined to grant confirmation, I think it would be good to know that, or for the company to be able to know that so they can know that that's where we're -- the direction we're headed. If you're still open-minded about it, we can -- we don't have to go there. But I wanted to at least put out the request because I'm sure my client was going to be asking about it.

THE COURT: I do not want any additional briefing.

I have everything I need --

MR. SCHROCK: Very good.

THE COURT: -- to have.

MR. SCHROCK: Okay.

THE COURT: A lot of issues have been raised that I hadn't thought about. I have a responsibility to work my way through all of those issues, so I --

MR. SCHROCK: Certainly.

THE COURT: -- and I don't -- I, you know, what is it in California, I used to go out there all the time, they give you those provisional rulings.

MR. SCHROCK: Yes.

THE COURT: And every time I got a --

MR. SCHROCK: I'm not looking for a provisional ruling.

THE COURT: Yeah, every time I got a provisional ruling in my favor, I then lost at the hearing.

(Laughter.)

MR. SCHROCK: I don't want that, Your Honor. So --

THE COURT: So I'm not --

MR. SCHROCK: -- we'll be patient.

THE COURT: -- yeah, I'm -- look, I'm doing everything I can do, I cancelled a vacation, I'm -- none of my staff is allowed in next week. Ms. Portillo was really happy about that.

MR. SCHROCK: Well, I'm --

THE COURT: Just so --

MR. SCHROCK: -- with that staff.

THE COURT: -- I can -- just so that I can write and I will get it done as quickly as I can. But there's some things I need to re-read and there's some things that I need to -- that I need to check on.

MR. SCHROCK: Okay. Very good.

THE COURT: But I understand that time is important.

MR. SCHROCK: Yes.

THE COURT: And I very much appreciate everybody indulging me. You know, I think through these things and, you know, whether I grant confirmation, enter a declaratory judgment, deny confirmation, or some combination of parts, you know, the outcome irrelevant largely to me, except for one thing, I want to get it right. And I'm going to do my best to get it right.

MR. SCHROCK: Well, on behalf of all us, Your Honor, we really do want to thank you for taking so much time to hear us today. I mean five hours plus, or about five hours of closing arguments.

THE COURT: Yeah, look, I learned, I learned some things and it crystalized a lot of the issues for me. So I very much appreciate it. I know a number of offers were made, so I'm going to accept them all. I would very much appreciate

everyone uploading their PowerPoints, just because I made some notes and I jotted down some page numbers and I would like to be able, when I sit down to go back and read it, I, you know, can look at my note and then turn back to the appropriate slide. That would really be helpful if folks don't mind doing that.

MR. SCHROCK: Very good. Your Honor.

THE COURT: All right. Thank you.

Anything else we need to talk about this evening?

Mr. Duran, I haven't heard from you in a week. Come on up, please.

MR. DURAN: Yes, Your Honor. Thank you.

For the Record, Your Honor, Hector Duran for the US Trustee.

THE COURT: Right.

MR. DURAN: We filed a limited objection.

THE COURT: Yeah, and I am so sorry that I didn't get you sooner. You just weren't in my eye path. I do apologize.

MR. DURAN: I understand. Section 1.74 of the plan defines the term exculpated parties. The US Trustee's objection focuses only on that part of the definition that includes Harvey Tepner and Joan Hilson as independent directors of the Debtors. We take the position that the plan improperly provides exculpation coverage to Mr. Tepner and

Ms. Hilson in violation of binding 5th Circuit precedent.

THE COURT: So let me ask you, because I had this earlier today, because I overruled one of your colleagues and appointed independent directors with an order. Do you think they get exculpation now since I appointed them?

MR. DURAN: Yes, we took the position in this case that without a Bankruptcy Court Order --

THE COURT: No, I got it. I'm just curious to see, because you know I've been a big advocate, I mean I've spoken about this a ton of times about I think independent directors ought to hired because I think it adds transparency to the process and it let's people see. And, but, you know, one of the -- if you follow the Circuit's recent pronouncement, I mean what that suggests is by entering that order those folks then absolutely get indemnity, even -- I mean with -- in the express suggestions of the order -- or of the opinion.

MR. DURAN: Right.

THE COURT: But you -- because they were simply done pre-petition, the Debtor had the right to do it I assume under the corporate governance, you're just suggesting that they are entitled to exculpations.

MR. DURAN: As long as that order is specifically providing that they're appointed to -- as independent directors.

THE COURT: Right. So let me ask you this, if I

make findings about their conduct in the case based upon the Record that I have, and then implemented a gatekeeper provision, do you think that's consistent?

MR. DURAN: No, I still think that under *Highland Capital* you still need that Court Order in this case.

THE COURT: No, I didn't -- I wasn't suggesting that there would be exculpation, but so let's -- let me give you an example.

So let's assume the Record reflects that Hector Duran in his capacity as Trustee did nothing wrong. And so I make a finding, this is based upon the Record, Hector Duran did everything right in this case. To the extent that you believe you have a -- and that becomes a finding, and then I said, to the extent that you want -- anyone wants to assert a claim against Hector Duran arising out of this case, they have to come to me, show me a colorable claim before it can brought.

Don't you think that's consistent with *Highland*?

MR. DURAN: It is consistent with *Highland*. We -- my alternative argument was that Mr. Tepner and Ms. Hilson are released parties. And to me the third-party release is a much broader one --

THE COURT: Right.

MR. DURAN: -- than the exculpation. And then it's protected by the injunction, the 1125(e) provision, and the

gatekeeper provision.

THE COURT: Got it.

MR. DURAN: To me those provisions screen and prevent bad faith litigation against the Debtors and those released parties, including the two independent directors --

THE COURT: Sure.

MR. DURAN: -- that could disrupt the plan's effectiveness.

THE COURT: Yeah, I was just trying to understand where your policy limits are on implementing *Highland*. I got it. I understand the issue, and I'm pretty confident that if I confirm the plan, I know how to deal with that. But I appreciate you making the argument.

MR. DURAN: Right.

THE COURT: And I appreciate you indulging me for what I started this morning.

MR. DURAN: Absolutely. I think the difference of opinion here, I mean court opinions are textual documents, they have a purpose and a factual context. The question here is whether the independent directors in Serta should be treated the same as the independent directors in *Highland Capital*.

And to answer that question you have to make an inference about the opinion's intent. I think our inference is different from the Debtors. They take a much broader view

of exculpation coverage and who should get it. We take a much narrower view and we base that on the paragraph in the opinion where it talks about the order being non-traditional and being unique -- creating a unique governance structure. And I guess that's the difference.

THE COURT: Sure. Thank you, Mr. Duran.

MR. DURAN: Okay.

THE COURT: Anyone else before we close up shop for the evening?

(No audible response.)

THE COURT: All right. In terms of boxes, materials, I know it's late, if you want to leave today, come back and get it tomorrow, that's perfectly okay with me. But if it's here tomorrow afternoon, unless it has intrinsic value that I appreciate, it's going in the trash.

(Laughter.)

THE COURT: Everyone safe travels home, make your plane. We're adjourned.

THE CLERK: All rise.

(The parties thank the Court.)

(Hearing adjourned 7:18 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability due to the condition of the electronic sound recording of the ZOOM/video/telephonic proceedings in the above-entitled matter.

/S./ MARY D. HENRY

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